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AND

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

HOMESTEAD ENTRY—CITIZENSHIP—HEIRS—EQUITABLE ACTION.

ELIZABETH RICHTER.

A homestead entry, under which the entryman who had declared his intention of becoming a citizen but had not been admitted to citizenship at the time of submitting final proof, may be equitably confirmed for the benefit of the heirs, and patent issue in their names, where the entryman dies, with his entry occupying such status, and a naturalized heir thereafter submits final proof.

The case of Joseph Ellis, 21 L. D., 377, cited and distinguished.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (C. W. P.)

I have considered the appeal of Elizabeth Richter from your office decision of February 29, 1896, holding final certificate, No. 334, for cancellation.

The land involved is the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 29, T. 26 N., R. 23 E., Waterville land district, Washington.

The record shows that William Richter made homestead entry, No. 768, of said tracts August 17, 1887, submitting final proof on July 23, 1894. With his proof he submitted a copy of his declaration of intention to become a citizen of the United States, with the statement that he had appeared with his witnesses on April 25, 1894, at the court house in Waterville, with the intention of taking out final citizenship papers, fully believing that the court would still be in session, but he found that the court had closed and the judge left town. He also stated that but two terms of the court are held in the county, and that he intends to be present at the next term of the court, which will be held on October 22, 1894, and that he will then take out his final papers.

The local officers approved the proof, accepted payment, and issued final certificate July 23, 1894.

December 7, 1894, you directed the local officers to advise the claimant that, upon receipt by your office of record evidence of Richter's naturalization, without unnecessary delay, the case would be referred to the board of equitable adjudication for final action.

On February 8, 1895, the local officers transmitted the affidavit of a physician, to the effect that Richter was and had been since October, 1894, dangerously ill, and unable to leave his house, also the affidavit of Richter's brother, in which he states that William Richter will, if able, be present at the term of court which will be held in April, 1895.

In July, 1895, the local officers transmitted final proof on said homestead entry, No. 768, by Elizabeth Richter, a naturalized citizen of the United States, and the mother of said William Richter, who died in April, 1895, with final certificate, No. 334, issued to the heirs of William Richter, deceased.

February 29, 1896, you decided that the proof made by Elizabeth Richter can not be accepted, and held final certificate No. 334 for cancellation, but directed that the final certificate No. 240, in the name of William Richter, be then referred to the board of equitable adjudication for the action of that tribunal.

The case turns upon the rights of the heir of an entryman, who has made a declaration of intention to become a citizen, but dies, before final proof has been accepted and final certificate approved, without actual naturalization.

Under the homestead laws, the right of entry is given to a citizen of the United States or one "who has filed his intention to become such, as required by the naturalization laws." But an entryman, although he may have fulfilled all the requirements of the homestead law, is not entitled to patent, unless he is at that time a citizen of the United States. (Section 2291 of the Revised Statutes.)

In the case of Joseph Ellis (21 L. D., 377), on the authority of which case your office decision is founded, Ellis was entitled to patent at the time of his death. And it is held in the case of Henry E. Stich (23 L. D., 457), that section 2448 of the Revised Statutes, which provides:

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become invested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

is applicable only when the right to patent exists in the entryman at the time of his death.

In the case under consideration, Richter, by reason of his not being naturalized at the time of his death, was not entitled to patent.

Your office decision is therefore erroneous.

The board of equitable adjudication has no authority in such cases. Its province is confined to entries so far complete in themselves, that, when the defects on which they are submitted have been cured by its favorable action, they pass at once to patent. James H. Taylor, 9 L. D., 230.

By the statutes of the State of Washington an alien may hold, convey and devise land, and if he dies intestate, the same shall descend

to his heirs. (1 Hill's Statutes and Codes of Washington, Title LXX, S. 2955.) And by the rule and order of descent of real property:

If the decedent leaves no issue, the estate goes in equal shares to the surviving husband or wife, and to the decedent's father and mother if both survive. If there be no father nor mother, then one-half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brothers or sisters, by right of representation. If decedent leaves no issue, nor husband nor wife, the estate must go to his father and mother. (Hill's Statutes and Codes, Title XVII, S. 2.)

It seems to me that on the principles of equity and justice this entry should be passed to patent, and I can see no objection to submitting final homestead certificate No. 334, on the proof made by Elizabeth Richter, to the board of equitable adjudication, under rule 33 of rules and regulations of the board.

You will therefore refer final homestead certificate No. 334 to the board of equitable adjudication, and, if confirmed, patent will issue in the name of the heirs of William Richter. *Agnew v. Morton*, 13 L. D., 228.

The decision of your office is modified accordingly.

TIMBER CULTURE APPLICATION—ACT OF MARCH 3, 1891.

GALLUP *v.* WELCH.

An application to make timber culture entry of land embraced within a prior prima facie valid railroad indemnity selection is properly rejected, and an appeal from such action secures no right that is protected by section 1, act of March 3, 1891, repealing the timber culture law.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (F. W. C.)

On May 7, 1896, J. F. Gallup filed a motion for the review of departmental decision of February 11, 1896 (not reported), in the case of said Gallup *v.* Wesley C. Welch, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 36, T. 85 N., R. 30 W., Des Moines land district, Iowa.

On October 6, 1896, said motion was entertained and forwarded to your office to be returned to Gallup for service within thirty days from receipt thereof.

Said motion has again been filed with evidence of service after the expiration of the thirty days allowed for that purpose, and for that reason motion is made to revoke the order entertaining the motion for review.

At the time the motion for review was entertained it was found that an error had been committed in the previous decision of this Department in the recognition of Welch's timber culture application after the repeal of the timber culture law, and for that reason it is deemed unnecessary to consider the motion to dismiss.

To a proper understanding of the matter, a brief history of the previous transactions had in relation to this tract is necessary.

As early as 1859 the land was selected by the State on account of the swamp land grant. On June 10, 1864, in a letter from your office addressed to the register and receiver at Des Moines, it was stated that the tract in question had been selected and patented to the State as swamp land under the act of 1850, and the local officers were directed to note the fact upon their tract books; which they did; and the same was duly noted upon the county records.

This tract is within Greene county, and as the State had conferred the swamp land grant upon the county, and the said county had contracted with the American Emigrant Company, said last mentioned company conveyed this land to James Callanan and James C. Savery. They in turn conveyed it to Gallup by quit-claim deed April 4, 1890.

This tract is also within the limits of the grant for the Cedar Rapids and Missouri River Railroad Company, now known as the Iowa Central Air Line Railroad Company, which company, on June 30, 1885, filed a contest against the swamp land claims embracing the tracts here in controversy, together with other lands, and at the same time filed an application to select this tract as indemnity, the same being accompanied by a tender of fees.

The statement contained in your office letter of June 10, 1864, to the effect that this land had been patented to the State as swamp land, was erroneous. So that, upon the company's contest, hearing was duly ordered, and upon the testimony taken the swamp claim was rejected, as to the tract in question, by your office letter of November 16, 1886. On November 24, 1886, the local officers approved the railroad company's application to select, and permitted the same to go of record.

On January 22, 1889, Welch applied to make timber culture entry of the land; his application being rejected by the local officers

because the land herein, as appears from the records of this office, appears to have been selected by the Cedar Rapids and Missouri River Railroad Company and approved at this office November 26, 1886; and because it is also shown by the tract book of this office that the within land was patented to the State of Iowa under the act of September 28, 1850.

From said decision Welch appealed.

By your office letter of April 11, 1892, the selection by the railroad company was canceled, because of the fact that the company had, in a suit brought by the American Emigrant Company against the railroad company, in 1882, to settle the question of conflicting rights between the two companies to certain tracts, disclaimed any right to the tracts in question, in consideration of which the Emigrant Company relinquished its claim to other lands involved in said grant.

In your said decision it is stated that on April 8, 1890, Gallup filed an application to select these tracts under the agricultural act of July 2, 1862; which application is rejected by said decision. It is further

stated in said decision that as Gallup is the present claimant under the swamp grant, the rights under which had been determined, in 1886, adverse to the State, in view of the cancellation of the company's selection, an application by him under the homestead law will receive due consideration.

On May 7, 1893, Gallup filed a petition asking that an investigation be made or ordered and that the tracts here in question be patented to the State of Iowa under the act of Congress approved September 28, 1850, as swamp land. To this application Welch filed objections on June 19, 1893, and in your office letter of March 10, 1894, the petition by Gallup, and also the appeal from the rejected application of Welch, presented as before stated in 1889, were considered.

Gallup's petition was denied, and the rejection of Welch's application was sustained, because of the fact that at the date of its presentation the tract was covered by the selection of the railroad company; and until the same was canceled, no rights could be acquired by the presentation of a timber culture application. Said selection was not canceled until after the repeal of the timber culture law by the act of March 3, 1891 (26 Stat., 1095); so that he acquired no right prior to the repeal of said law.

In the decision under review, so much of your office decision of March 10, 1894, as denied Gallup's petition was affirmed. But in considering Welch's claim under his timber culture application, it was stated:

I find that Welch initiated his claim to make timber culture entry of the tract in controversy on January 22, 1889; that he appealed from the decision rejecting his application and that his appeal was not passed upon by your office until March 10, 1894; and that under the proviso of the first section of the act of March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber culture laws and for other purposes," he is entitled to perfect his timber culture entry upon due compliance with law, in the same manner as if said act had not been passed.

The proviso of section 1 of the act of March 3, 1891 (*supra*), saving from the terms of the forfeiture certain rights, provides that the repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all *bona fide* claims lawfully initiated before the passage of this act may be perfected upon due compliance with law.

The only question for consideration therefore is: Did Welch, by the presentation of his application in 1889, and while the land was covered by the selection of the railroad company, acquire any valid right, and can it be said that he had, at the date of the passage of the act of March 3, 1891, a claim lawfully initiated before the passage of said act?

In the case of *Simser v. Southern Minnesota Railway Company* (12 L. D., 386), it is held (syllabus): "A timber culture application can not be accepted for land embraced within a prior railroad indemnity selection." See also *Rudolph Nemitz* (7 L. D., 80); *Northern Pacific Railroad Company v. Halvorson* (10 L. D., 15); *Darland v. Northern*

Pacific Railroad Company (12 L. D., 195); and *Gorder v. St. P., M. & M. Ry. Co.* (24 L. D., 434).

The question as to the effect of the pendency of an appeal from the rejection of an application to enter has been repeatedly considered by this Department and it has been uniformly held that an application to enter is the equivalent of an actual entry or constitutes a claim lawfully initiated only in case the application is found to have been improperly refused.

As this land was embraced in a selection *prima facie* valid at the time Welch tendered his timber culture application, it must be held that the action of the local officers in denying his application was proper, and that by such presentation a claim under the timber culture law was not lawfully initiated.

Said departmental decision of February 11, 1896, in so far as it is held that Welch is entitled to perfect his timber culture entry in the same manner as if the act of 1891 had not been passed, is recalled and vacated, and your office decision sustaining the rejection of Welch's application is affirmed.

This leaves for consideration Gallup's petition for a further investigation as to the swampy character of this tract, and in the motion for review attention is also called to the fact that, acting upon the suggestion contained in your office decision of April 11, 1892, Gallup did, in July 1894, tender homestead application for this tract, upon which no action has as yet been taken.

This tract having been, after investigation, adjudged to be non-swamp, this Department might refuse to make further investigation in the matter, but in view of the fact that this proceeding was upon the contest of the railroad company, instituted in 1885, and that said company had about three years prior thereto, in an action between the railroad company and the Emigrant Company, the claimant under the swamp grant, apparently admitted that this tract passed under the swamp grant, I have deemed it advisable to grant Gallup's request for a further investigation upon this question, namely, as to whether this tract was embraced within the grant of 1850 to the State of Iowa as swamp land, and that action upon his homestead application be in the meantime suspended. Should the previous adjudication of your office as to the character of the land be adhered to, Gallup's application under the homestead law will then be considered, and the tract disposed of as other public land; otherwise, in accordance with the grant of 1850, the tract will be patented to the State on account of the swamp grant.

So far as in conflict herewith, the previous decision of the Department is set aside, and your office decision is accordingly modified and the case herewith remanded for your further action in accordance with the direction herein given.

MINING CLAIM—MILLSITE—ADVERSE CLAIM.

SNYDER *v.* WALLER.

The adverse proceeding contemplated by the mining law is for the purpose of determining the right of possession as between conflicting mining claims, and does not include a suit in the courts to settle a question as to the character of the land.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (P. J. C.)

The prior history of this controversy will be found in 20 L. D., 144, and 22 Id., 318, where the facts are set forth in detail. For the purposes of this case in its present shape, it is only necessary to say that Joseph Snyder filed a protest against the mineral entry of Oscar Waller for the Waller No. 1 lode claim. Snyder claimed the Rainy Day millsite, which conflicted with the Waller lode. Among other charges made by the protest was, that the ground was non-mineral. A hearing was had, and the local officers recommended that the protest be dismissed. They concluded that the preponderance of the testimony seemed to favor the mineral applicant, and on appeal your office affirmed their judgment, but ordered a republication of the application for patent, and added: "Under the republication and reposting, adverse claims may be filed as in the case of an original publication and posting of the notice." This judgment became final, for the reason that there was no appeal. The case finally reached the Department on certiorari, and your office judgment was affirmed (see cases cited above).

In conformity with the order of your office, Waller made republication, and during the period thereof Snyder filed his protest and adverse, and within the statutory period instituted suit in the local court. Subsequently Waller moved the local office to dismiss the adverse claim, for the reason that:

The said adverse claim being based on a mill-site claim, which must be non-mineral, for the reason that it has already been determined by this Department in proceedings between the parties hereto that the premises herein involved are mineral in character and subject to entry under the mineral laws, which determination is conclusive.

The local officers overruled the motion, and on appeal your office affirmed their action, whereupon Waller prosecutes this appeal, assigning error as follows:

(1) The Honorable Commissioner erred in his decision herein in holding that the adverse claimant, Joseph Snyder, is not barred and estopped from asserting his mill-site location herein by the former decisions of this Department upon the protest heretofore filed in Joseph Snyder *v.* the application and entry of Oscar Waller for the Waller No. 1 lode claim, lot No. 722.

(2) The Honorable Commissioner erred in his said decision in not holding that said Snyder by his general appearance in said protest proceedings did not waive as to himself all irregularity or lack of notice connected with the entry of said lode claim and the said hearing.

(3) The Honorable Commissioner erred in his said decision in holding that said prior decisions of this Department did not fix and determine the mineral character of the land embraced in said Snyder's mill-site location, and that such determination was not and is not conclusive upon him in this proceeding.

(4) The Honorable Commissioner erred in denying Oscar Waller's motion to dismiss the protest and adverse claim of said Joseph Snyder filed herein, and in holding that if the judgment heretofore rendered herein is conclusive of Snyder's claim it is necessary or proper that this appellant, Waller's claim, should be determined or settled in the adverse suit now pending, for the reason that if said former judgment is conclusive of Snyder's claim, then Waller's claim should be determined by the Land Department *ex parte* according to the usual practice in *ex parte* cases.

Section 2337 (Revised Statutes) provides that non-mineral land may be patented as a mill-site, "subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes."

It appears that the Rainy Day mill-site was "located" in 1878, but so far as the record shows no attempt has ever been made to secure a patent for the same. In 1889 the Waller lode claim was located, which conflicts with the mill-site. As a result of the hearing had, it was decided that the land was mineral in character, and this judgment became final. The character of the land is therefore finally settled as mineral. Hence, it follows that it can not be entered as a mill-site. (Alta Mill-site, 8 L. D., 195.)

The adverse proceeding contemplated by the statute is for the purpose of determining the right of possession as between parties claiming conflicting mining claims, and does not, in my judgment, comprehend a suit in the courts to settle the question as to the character of the land. That subject is one that is exclusively within the jurisdiction of the land department, and any judgment of a court on this question would not be, necessarily, binding on the Department. (Alice Placer Mine, 4 L. D., 314; Powell v. Ferguson, 23 L. D., 173.)

Where the character of the land is involved to the extent that the determination of that question fixes the right to purchase the same, it can only be decided by the executive branch of the government which is clothed with the power to determine the question. It follows, I think, that there is nothing for the court to determine under the adverse that would aid the Department in deciding to whom the patent should issue.

Your office judgment is therefore reversed, and the motion to dismiss the protest and adverse is sustained.

CONTEST—ORDER OF DISMISSAL.

LIMBOCKER v. STOVALL.

A contest should be dismissed if not diligently prosecuted to trial and judgment.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (E. B., Jr.)

This is a contest, initiated June 30, 1893, by Clarence I. Limbocker, against the homestead entry of James M. Stovall, made April 30, 1889, for the SE. $\frac{1}{4}$ of section 17, T. 6 N., R. 1 W., Oklahoma City, Oklahoma,

land district. The land described was opened to settlement at noon of April 22, 1889, under the act of March 2, 1889 (25 Stat., 1004). Limbocker's contest affidavit charged that Stovall entered upon land opened to settlement under said act subsequent to the date of the act and prior to the date of the opening, in violation of said act and the proclamation of the President thereunder dated March 23, 1889.

This contest, together with a prior contest of one Charles N. Cushman against the said entry on the same ground, having been dismissed by the local office for want of prosecution, under general instructions from your office relative to numerous contests which had not gone to trial and were apparently lying dormant and neglected, was, on appeal by Limbocker, reinstated by your office decision of March 4, 1895, on the ground that, as therein stated, the local office—

erred in dismissing Limbocker's contest for want of prosecution, without first issuing a notice of hearing thereon and giving him an opportunity to serve it, because he could not otherwise know that the prior contest had been disposed of.

Hearing was thereupon duly ordered by the local office on Limbocker's contest (Cushman's having been disposed of by the dismissal thereof and his failure to appeal) for May 13, 1895, on which day, on plaintiff's motion, the case was continued to June 3, 1895. The contestant failing to appear on the last mentioned date, the case was then, on motion of contestee, dismissed for want of prosecution. On July 2nd, following, contestant filed a motion to reinstate the contest on the ground, in substance, that, understanding that the case was continued to June 4, 1895, he made no effort to appear on the day preceding, but was ready, however, for trial on either of those days. With the motion there was filed affidavits of contestant and his attorney tending to show that they had understood that June 4th, and not June 3d, 1895, was the day set for the trial of the case.

On July 18, 1895, the local office denied the said motion in the following language:

The within application to set aside dismissal is denied. Plff's counsel was before the office when continuance was granted and knew the day set.

On appeal by Limbocker your office, on December 10, 1895, in affirming the refusal of the local office to reinstate the contest, said:

It is very evident that this contest has not been diligently prosecuted, and that Limbocker has very tardily taken the various steps by which he has sought to keep his contest alive. Plaintiff and his attorney were both present at your office on May 13, 1895, when the case was, at their request, continued to June 3, 1895, and they therefore have no valid excuse for not knowing positively when the case would come up again in regular order. Besides plaintiff's attorney was advised by telegram (in response to his request), on the very day of the dismissal, that such action had been taken, and yet he did not ask a reinstatement until July 2, 1895.

Contestant now duly prosecutes here an appeal from the decision last mentioned, of your office, contending that under the facts shown it was error on the part of your office not to have directed the reinstatement of his contest.

Contestant's motion for reinstatement having been filed within thirty days from the telegraphic notice (in response to a telegram by his attorney asking whether the case would be heard on June 4, 1895) he is not chargeable with negligence in respect to that motion, as suggested in your office decision (Rule 43 of Practice, 23 L. D., 599). But, having accepted such notice and acted upon it in time by appealing to your office, it is now too late to raise, for the first time, as the present appeal seeks to do, the question of the sufficiency of such notice.

As suggested by the decision of your office, the charge of "soonerism" made by Limbocker against the validity of Stovall's entry has not been diligently prosecuted. More than four years after entry were allowed to elapse before this contest, based upon that general charge, was initiated. More than eight years have passed since Stovall, now over sixty-four years of age, began to make a home on the land involved for himself and his family. A similar charge by another person, as already hereinbefore indicated, was allowed to drop without trial. Such cases as these, where the party who files the contest affidavit claims no right to the land superior to that of the entryman, but appears to charge only a disqualification and secure a forfeiture, must be diligently prosecuted to trial and judgment, or suffer dismissal for the failure so to do. This entryman should not be further harassed at this late day by a tardy contestant. The local office is positive that Limbocker's counsel knew that the case was regularly set for trial on June 3, 1895. As both said counsel and his client were present when the continuance to that date was granted, at their request, they should have known with certainty the day on which they were required to proceed with the case.

The default is not excusable. The motion to reinstate the case was properly denied by the local office, and your office decision sustaining the denial is hereby affirmed.

SWAMP LANDS—WAGON ROAD GRANT—ESTOPPEL.

STATE OF OREGON *v.* WILLAMETTE VALLEY AND CASCADE MT.
WAGON ROAD CO.

The State by securing title to lands under the wagon road grant of July 5, 1866, is estopped from subsequently claiming the same lands under the prior grant of swamp lands.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (F. W. C.)

The appeal filed on behalf of the State of Oregon from your office decisions of January 9 and 10, 1896, rejecting the claim made by the State on account of its swamp land grant to certain described tracts situated within the Burns and The Dalles land districts, Oregon, for

the reason that the tracts claimed had either been certified or patented to the State on account of the grant made by the act of July 5, 1866 (14 Stat., 89), for the benefit of the Willamette Valley and Cascade Mountain Wagon Road Company, has been considered.

By the act of July 5, 1866 (*supra*), a grant was made to aid in the construction of a certain wagon road therein described, which act was duly accepted by the State, and by act of its legislature, approved October 24, 1866, was conferred upon the Willamette Valley and Cascade Mountain Wagon Road Company.

The tracts here involved were at different times selected on account of the wagon road grant, and, as before stated, all of the lands have either been certified or patented on account of said wagon road grant.

The State has also made selection of the lands, claiming that they had passed to the State as swamp land under the act of March 12, 1860 (12 Stat., 3), which was prior in time to the act making the grant to the wagon road company.

With but a few exceptions the lands had been selected and approved on account of the wagon road grant long prior to the assertion of any claim on account of the swamp grant.

As thus presented the case is in all important particulars similar to that of the State of Iowa *v.* Cedar Rapids and Missouri River, Dubuque and Sioux City, and Iowa Falls and Sioux City Railroad Companies, decided August 24, 1876, and reported in volume 2 of Copp's Land Laws, 1882, page 959. There the lands had been selected and approved on account of acts making grants to the State to aid in the construction of certain railroads, which grants had been by its general assembly conferred upon certain railroad companies. After the certification of the lands on account of the railroad grants, claim was made that the same tracts had passed to the State under the swamp grant, which antedated the railroad grant, and the State therefore requested that patents should issue to her for the lands, notwithstanding the certification on account of the railroad grants.

The State's claim was sustained by your office, whereupon the companies appealed, urging the following objections:

First. That the State is estopped by her own acts and by the acts of her authorized agents from asserting any claim to the lands in question.

Second. That the said lands, having been once duly certified to the State or to said companies under grants made to aid in the construction of certain railroads, have passed beyond the jurisdiction of this Department.

In considering said objections the Department, in said decision of August 24, 1876, held as follows:

After the lines and routes of the several railroads mentioned in the act of July 14, 1856, aforesaid, became definitely fixed, the State, through her duly authorized agent, procured the lands inuring to said grant, including the lands in question, to be certified to her, and then transferred them to the companies entitled thereto respectively.

It further appears that the State by act of her general assembly authorized the said companies to make such disposition of said lands, by mortgage or deed of trust,

as might by them be deemed proper, in order to secure means to aid in the construction of said roads, and that they were mortgaged for that purpose. It further appears that the State has insisted on her right to tax said lands as the property of the respective railroads since they were transferred to them, for State, county, and all other purposes, which taxes the companies have been compelled to pay.

In view of the facts thus appearing, I am of the opinion that the objection is well taken. A State may be estopped by her own acts, or the acts of her authorized agents. (*Commonwealth v. Andre*, 3d Pick, 224. *Brausen v. Wirth*, 17 Wall., 42. *Nieto v. Carpenter*, 7 Cal., 528. *Bigelow on Estoppel*, 246.)

Upon the question raised by the objection I am of the opinion that the rule laid down by Secretary Thompson in his decision of February 8th, 1860, that "when the Department has fully executed one grant its officers should cease all action under another grant of the same land to the same grantee," should be followed in this and all similar cases. While I am not prepared to admit that the Department loses jurisdiction to act in every case where lands have been certified or patented, I am of the opinion that it should be exercised only in extreme cases, where without its exercise the party entitled to the land would be remediless. The reason for this rule is clearly stated in the decision of my predecessor in the case of *Latimer et al. v. the B. & M. River Railroad Company*. (*Copp's Land Laws*, page 403.) "It is of the utmost importance that titles given by the Department should rest on a firm and substantial basis, that they should be accepted and recognized as final adjudications by the Department of the rights on which they are founded, that persons holding these should be secured in their possession and the public generally should have confidence in their stability." If the State of Iowa had any rights to the lands now claimed by her which she has not granted or forfeited she has a complete remedy therefor in the courts, without the aid of this Department.

After careful consideration of the matter I agree fully with the conclusions reached in said opinion, upon which it appears the action taken in your office decisions now under consideration was predicated.

Said decisions are therefore accordingly affirmed.

COSTS--CONTEST INVOLVING PRIORITY OF SETTLEMENT.

SMITH v. CORRELL.

In a contest arising on an allegation of a prior settlement right the costs should be assessed under Rule 55 of Practice.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (O. J. G.)

On July 11, 1893, Phillip A. Correll made homestead entry for the NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ section 16, and the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ Sec. 15, T. 10 S., R. 5 E., Oregon City land district, Oregon.

On the same date Edwin V. Smith filed an affidavit of contest against Correll's entry, so far as it covered the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 15, alleging priority of settlement.

After a hearing was had on said affidavit of contest the local office rendered decision dismissing Smith's contest and holding Correll's entry intact. Smith appealed to your office, where, under date of March 11,

1896, the said decision of the local office was affirmed. Your said office decision concluded as follows:

In determining who should pay the costs in this proceeding, it appears that you adjudged that Smith should pay all the costs, and Smith appeals from that to this office. Smith in his application to contest Correll's entry claims that he was the first settler on said land and that he claims said land by virtue of priority of settlement over Correll. He is not claiming a preference right to said land, and rule 54 does not apply. Your taxation of costs is set aside, and you will retax the costs under rule 55.

Smith appealed to this Department from the decision of your office in dismissing his contest, and Correll appealed from the above order contained in the same decision as to the taxation of costs under rule 55. Both appeals were transmitted to the Department under date of July 11, 1896.

On March 15, 1897, the Department rendered decision wherein the action of your office in dismissing Smith's contest and holding Correll's entry intact was affirmed.

Smith now files what purports to be an application for certiorari; that is,

for an order directing your office to defer and to withhold all and further action on the departmental decision in the foregoing case, dated March 15, 1897, until the motion and the case as above entitled, involving the question of taxing the costs herein under rule 55, now pending before the Secretary on appeal by the contestee herein from that portion of your office decision of March 11, 1896, may be determined and complied with.

It is contended by the applicant that

to allow the contestee to make final entry upon the proof already submitted and now pending before the local office, waiting the determination of the right of entry herein, would, in the event of the Secretary affirming the Commissioner's decision of March 11, 1896, taxing costs under Rule No. 55, place the contestee out of the jurisdiction of the office, and thus defeat the relief asked for.

The Department in its decision of March 15, 1897, failed to pass upon that feature of the case having reference to the taxation of costs, although duly considered in your said office decision, and raised on appeal to this Department. In view of this fact the said application may very properly be treated as a motion for review, and the decision thereon as supplemental to the decision already rendered and promulgated.

After careful consideration of the question raised as to the proper taxation of costs in these proceedings, I am of opinion that the order of your office was correct, and is accordingly hereby affirmed.

This decision by the Department will constitute authority to your office to demand compliance with the order contained in your office decision of March 11, 1896, as to the taxation of costs under Rule 55, before finally passing the land in controversy to patent.

CONTEST—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

NYMAN *v.* JOHNSON.

A contest against a pre-emption entry, as to part of the land covered thereby, on the ground of a settlement right, and failure on the part of the pre-emptor to comply with law, is barred under the proviso to section 7, act of March 3, 1891, if, after the lapse of two years from the issuance of final receipt, there is pending no contest or protest involving the land in question.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (C. J. W.)

On August 15, 1892, Thomas Johnson filed pre-emption declaratory statement, No. 7778, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 5, and NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 8, T. 6 N., R. 8 W., Oregon City, Oregon, alleging settlement November 14, 1889. September 19, 1892, John Rian filed declaratory statement, No. 7802, for lot 1 and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 5, and lots 3 and 4, in said township, alleging settlement January 9, 1888, and January 19, 1893, he transmuted his declaratory statement to homestead entry No. 10495.

On March 18, 1893, Johnson offered final proof, but did not cite Rian specially, and final cash certificate. No. 5947 issued to him, including the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 5, which was also embraced in Rian's filing. Johnson's final receipt and certificate bears date March 22, 1893.

On July 27, 1894, Rian filed affidavit of contest, alleging in substance prior settlement on the land in controversy. A hearing was ordered, and the local officers found from the proof that Rian made his settlement in advance of Johnson and recommended the cancellation of Johnson's entry as to the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 5, and from this decision Johnson did not appeal and it became final.

On September 26, 1896, Joseph Nyman filed affidavit of contest against said cash entry, alleging settlement on the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5 and NE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 8, T. 6 N., R. 8 W., and that Johnson did not reside upon, cultivate or improve said land as required by law; and praying that he be allowed to prove his allegations.

The local officers forwarded said affidavit to your office, and the same was on the 10th of December, 1896, considered, and the contest dismissed. From this decision Nyman has appealed to the Department. It is alleged—

1st. That it was error to hold that there was no pending contest against the validity of Johnson's entry within two years after such entry.

2d. That it was error to hold that Nyman's contest was barred by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

Said proviso is as follows—

Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber culture, desert land, or preemption laws, or under this act, and where there shall be no pending contest or protest against the validity of such entry, the entryman

shall be entitled to a patent conveying the land by him entered and the same shall be issued to him, but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Your office properly held that at the end of two years from the date of the issuance of the receiver's final receipt, there was no contest or protest pending against the entry of Johnson touching the land to which Nyman now lays claim, and that his contest was barred by the proviso aforesaid.

Johnson was not bound to live on the land after he submitted final proof and paid the purchase money; Nyman's alleged settlement after final cash entry of Johnson appears to be an act of trespass rather than one of rightful settlement.

Your office decision dismissing Nyman's contest is affirmed.

SUGAR LOAF RESERVOIR SITE—ACT OF MARCH 2, 1897.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 14, 1897.

REGISTER AND RECEIVER, *Leadville, Colo.*

SIRS: In accordance with the provisions of the Act of Congress approved March 2, 1897, entitled: "An act to vacate Sugar Loaf Reservoir site in Colorado and to restore the lands contained in the same to entry," (29 Stat. 603), you are hereby instructed to dispose of the lands involved at public auction at your office after thirty days notice by advertisement at a price not less than two dollars and fifty cents per acre.

To carry out the purposes of the act (the use of the lands for a reservoir site), it will be necessary to offer all the lands in a single lot, and under the conditions prescribed in the notice, a draft of which is enclosed herewith, in which you will insert some hour convenient for the sale.

The notice is to be published once a week for thirty days in some newspaper of general circulation in your district and in the vicinity of the lands, the first publication to be in the last week of July. A copy of the published notice shall be posted in your office for at least 30 days prior to the date of sale.

On the day and at the hour named you will offer the lands in a single block, to the highest bidder at a price not less than two dollars and fifty cents per acre, the purchase money to be paid immediately upon the acceptance of the bid. In the event that any bidder fails to pay the amount of his bid, you will re-offer the lands, and will not again recognize him as a bidder during the continuance of the sale.

You will so conduct the sale as to secure fair dealing and the best price obtainable for the lands.

Upon the payment of the amount of the bid, you will issue certificate and receipt similar in form to the ordinary cash certificates and receipts. You will give them current numbers and date, modifying them to suit the case, and changing the last paragraph of the certificate so as to read as follows:

"Now therefore be it known, that on the presentation of this certificate to the Commissioner of the General Land Office, and the submission, within three years from the date of this certificate, of satisfactory proof of his title to the lands in said reservoir heretofore disposed of by the Government, and of the construction of the reservoir and the storage of water therein for increasing the flow of the Arkansas River, as contemplated by the Act of March 2, 1897, the said shall be entitled to receive a patent for the tracts above described, subject to the conditions prescribed in the notice under which this sale was made." You will write on the margin of the certificate "Public sale of lands in Sugar Loaf Reservoir Site under Act of March 2, 1897," and will report the sale on your regular cash abstracts, writing opposite the item the same statement. You will also make report thereof on your regular quarterly returns.

The sale concluded you will make special report of your proceedings to this office. In accounting for disbursements the receiver will include disbursements made on account of said sale in his regular disbursing accounts accompanied by proper vouchers. You will also transmit to this office a copy of the paper containing the first publication of the notice, for its information.

Your attention is called to the fact that in the list of lands in the notice are included the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and Lot 11, Sec. 19, T. 9 S., R. 80 W. (i. e. the fractional NE. $\frac{1}{4}$). By your letter of June 23, 1897, you report that you had notified two parties who had filed declaratory statements for the NE. $\frac{1}{4}$ that they would be allowed 60 days to show cause why they have not completed their filings, in default of which the filings would be canceled, in accordance with the instructions of office letter of June 19, 1897. Should either of the parties take any action within the time allowed, that is, up to and including Sept. 1, 1897 you will omit the said tracts from the lands sold. But if no action be taken by either of the parties within that time, you will include the said tracts in the list of lands sold.

You will acknowledge the receipt of this letter.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved July 13, 1897.

C. N. BLISS, *Secretary.*

SWAMP GRANT—INDIAN OCCUPANCY—ALLOTMENT.

STOCKBRIDGE AND MUNSEE INDIANS *v.* STATE OF WISCONSIN.

The fee to swamp lands in the State of Wisconsin embraced within the right of Indian occupancy provided for by the treaty of October 18, 1848, passed to the State by the subsequent swamp grant; but the right of possession under said grant remained in abeyance until such time as the Indian right of occupancy should be surrendered, or otherwise ended by the United States.

When by the subsequent treaty of February 11, 1856, the Indians, so protected, ceded to the United States certain lands embraced within their right of occupancy, such relinquishment, as to the lands covered thereby, though for the expressed purpose of locating the Stockbridge and Munsee Indians and other Indians thereon, operated to remove the only obstacle to the merger of the right of possession with the fee that passed under the swamp grant, and entitled the State to receive patents under said grant.

The act of March 3, 1893, providing for the issuance of patents to the Stockbridge and Munsee Indians under allotments selected in accordance with the treaty of 1856, where said Indians had remained in possession under said allotments, did not contemplate the issuance of patents for lands that had prior thereto passed to the State under the swamp grant.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
July 12, 1897. (W. C. P.)

In response to your request for an opinion as to the proper course to procure a relinquishment from the State of Wisconsin of certain lands allotted to Stockbridge Indians and the cancellation of patents issued to said State therefor in 1865, I would submit the following:

By letter of February 20, 1897, this Department directed the Commissioner of the General Land Office to issue patents to certain Indians of the Stockbridge and Munsee tribes in accordance with the approved schedule of allotments transmitted therewith. On March 22, 1897, the Commissioner of the General Land Office reported that certain of the tracts embraced in said schedule, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 28 N., R. 14 E., had been conveyed to the State of Wisconsin as swamp lands by patent dated November 13, 1865. He further stated that this fact was called to the attention of the Department on April 5, 1866, and that his office was by departmental letter of April 23, 1866, notified that the State declined to surrender the patent for said tracts. He referred to the decision of the supreme court in *Weeks v. Bridgman* (159 U. S., 541) and the ruling of this Department holding that an erroneous certification of lands is null and void and constitutes no bar to a subsequent issuance of patent, and submitted the following:

I have to ask whether under said decisions patents cannot be issued to the Indians for the lands erroneously patented to the State as aforesaid.

This letter was referred to the Commissioner of Indian Affairs for consideration and report, who as to those tracts suggests:

That inasmuch as the patent to the State of Wisconsin issued in 1865 was erroneously issued, and as the Indians are entitled under their treaty to take the lands

on which they have located in allotment it would seem that the government is under some obligation to deliver to the Indian a fee simple patent, free of any cloud or incumbrance whatever, and that the State should again be requested to relinquish, or be compelled to do so by suit, if it should refuse.

Thereupon the matter was referred to me for an opinion, as before stated:

By a treaty between the United States and the various tribes of Indians, made August 18, 1825 (7 Stat., 272), the boundaries of the lands to be occupied by the several tribes were agreed upon, and the land here in question fell within the boundaries of the tract assigned to the Menominee Indians. By the treaty of February 8, 1831 (7 Stat., 342), between the United States and said Menominee Indians certain tracts were ceded to the United States, but the tracts involved here fell within the boundaries of a larger tract, which it was agreed, "shall be set apart and designated as their home."

By the treaty of October 18, 1848 (9 Stat., 952), said Indians ceded all their lands in Wisconsin to the United States, the second article thereof reading as follows:

The said Menominee tribe of Indians agree to cede, and do hereby cede, sell, and relinquish to the United States all their lands in the State of Wisconsin wherever situated.

In exchange therefor the Indians were given certain lands west of the Mississippi river for a home, but it was further provided by Article VIII. as follows:

It is agreed that the said Indians shall be permitted, if they desire to do so, to remain on the lands hereby ceded for and during the period of two years from the date hereof, and until the President shall notify them that the same are wanted.

It seems that the Indians were not removed, but continued to occupy as before the lands thus ceded to the United States, and that this condition of affairs existed at the date of the act of September 28, 1850 (9 Stat., 519), granting the swamp lands to the several states.

On May 12, 1854, another treaty was entered into with these Indians (10 Stat., 1064), by which they ceded to the United States all the lands assigned to them under said treaty of October 18, 1848, and the United States agreed to give "to said Indians for a home to be held as Indian lands are held", townships 28, 29 and 30 of ranges 13, 14, 15, and 16, the lands in question being situated in one of said townships. In the preamble to this treaty after a recitation of the pertinent provisions of the former treaty, the following language, showing the reasons for and objects of said latter treaty, is used:

And whereas, upon manifestation of great unwillingness on the part of said Indians to remove to the country west of the Mississippi River, upon Crow Wing, which has been assigned to them, and a desire to remain in the State of Wisconsin, the President consented to their locating temporarily upon the Wolf and Oconto Rivers

Now, therefore, to render practicable the stipulated payments herein recited, and

to make exchange of the lands given west of the Mississippi for those desired by the tribe, and for the purpose of giving them the same for a permanent home these articles are entered into.

The first connection of the Stockbridge and Munsee Indians with these lands is found in the treaty of February 5, 1856 (11 Stat., 663) by which said Indians ceded to the United States all their lands at Stockbridge in Wisconsin and their lands in Minnesota, in consideration of which cession the United States agreed

to select as soon as practicable, and to give them a tract of land in the State of Wisconsin near the southern boundary of the Menominee reservation, of sufficient extent to provide for each head of a family and others lots of lands of eighty and forty acres as hereinafter provided.

By the treaty of February 11, 1856 (11 Stat., 679) the Menominee Indians ceded to the United States a "tract of land, not to exceed two townships in extent, to be selected in the western part of their present reservation on its south line," for the purpose of locating thereon the Stockbridge and Munsee Indians.

Under the provisions of these treaties townships 28 of ranges 13 and 14 were selected for the purposes indicated therein, and the majority of said Indians were removed to this land. Afterwards, the act of February 6, 1871 (16 Stat., 404) directed the appraisal and sale of said two townships, with a provision authorizing the Secretary of the Interior to reserve from sale a quantity of said land not exceeding eighteen contiguous sections for allotment to the "Indian party" of said tribe. It seems that portions of said two townships of land were sold under the provisions of this act, and that some allotments were made thereunder, but on account of dissensions existing among the Indians and dissatisfaction with the enrollment made under said act, further legislation seemed necessary. Accordingly, the act of March 3, 1893 (27 Stat., 744) was passed which directed an enrollment of said tribe to be made and declared all members thereof who entered into possession of allotments under the treaty of 1856, or the act of 1871, and had remained in possession thereof "to be owners of such lands in fee simple in severalty, and the government shall issue patents to them therefor."

Under this act an enrollment of said Indians was made and the schedule of allotments in question was prepared and approved.

This recital of the treaties and acts of Congress affecting these lands gives a history of the Indians' claim thereto. The claim of the State is asserted under the grant of September 28, 1850, which was of the swamp and overflowed lands "which shall remain unsold at the passage of this act," and has been construed by this Department and the courts as a grant *in presenti*, operating to vest in the grantee State the title to all such land as of the date thereof. There is no intimation that these tracts were not of the character contemplated by the granting act and the only question is as to whether the occupancy thereof

by the Indians under the permission given by the treaty of 1848 was sufficient to except these from the grant.

It was held in *State of Michigan* (8 L. D., 308), that lands of the character granted, but covered at the date of the swamp land grant by a temporary reservation, passed under said grant subject only to the use contemplated by the reservation. In *Callanan et al. v. Chicago, Milwaukee and St. Paul Railway Company* (10 L. D., 285) it was held that the fee of swamp lands occupied by the Indians at the date of the grant passed thereunder, and that the right of possession attached itself to the fee at once upon the extinguishment of the Indian right of occupancy. In both these cases reference was made to the case of *Beecher v. Wetherby* (95 U. S., 517), which arose under the grant of lands for school purposes, and it was said that the swamp land grant should receive the same construction upon this point as was there given to the school grant.

The land involved in *Beecher v. Wetherby* was section 16 in the same township in which the lands here in question are situated. It was there held that the land passed to the State subject to the right of Indian occupancy; it being said:

The grantee, it is true, would take only the naked fee, and could not disturb the occupancy of the Indians; that occupancy could only be interfered with or determined by the United States.

The tract involved there had been sold under the provisions of the act of February 6, 1871, *supra*, whereby all rights therein in the Indians had been determined. The controversy there was between a claimant under patents from the State and a claimant under patents direct from the United States by virtue of the sale under said act of 1871. No interest of any Indian, or of any one claiming under or through an Indian was involved in that case. So in the departmental decision cited above the occupancy right of the Indians had been extinguished.

A similar question arose in the case of *United-States v. Thomas* (151 U. S., 577), where it was charged that a crime had been committed within the limits of the La Court Oreilles Indian reservation in Wisconsin, but upon section sixteen. It was contended that section 16 in every township in Wisconsin was ceded to the State for school purposes and could not therefore be subsequently taken by the United States and set off as a part of an Indian reservation. By a treaty made in 1842 the Chippewa Indians were given a right of occupancy to a large tract of land in Wisconsin and in 1854, by treaty, relinquished their claim to this large tract, separate smaller reservations being provided for the several tribes, among them; that of La Court Oreilles. In speaking of the rights of the Indians and referring specifically to the treaty of 1854, the court used the following language:

The treaty did not operate to defeat the prior right of occupancy to that particular section, but, by including it in the new reservations, made as a condition of the cession of large tracts of land in Wisconsin, continued it in force. The State of

Wisconsin, therefore, had no such control over that section or right to it as would prevent its being set apart by the United States, with the consent of the Indians, as a part of their permanent reservation. So, by authority of their original rights of occupancy, as well as by the fact that the section is included in the tract set aside as a portion of the permanent reservation in consideration of the cession of lands, the title never vested in the State, except as subordinate to that right of occupancy of the Indians.

In State of Wisconsin (19 L. D., 518) a question arose as to whether selections of the State under the swamp land grant of tracts in the occupancy of the Indians should be approved. This involved the treaties with the Chippewa Indians of 1842 and 1854 mentioned by the supreme court in *United States v. Thomas*, *supra*, and the Department, after again ascertaining that the school-grant and the swamp land grant are similar in character so far as the passing of title is concerned, and that the same reasoning applies in cases under the former as under the latter grant, and referring specifically to *United States v. Thomas*, used the following language:

It is therefore directly in point and is authority for saying that by the grant of 1850 the State of Wisconsin acquired the title to the swamp lands in the Lac de Flambeau reservation, subject to the right of Indian occupation, the mere naked fee, without the right to occupy until the Indian right shall have been extinguished. But instead of any action looking to the extinguishment of Indian right of occupancy, it has been made more certain and stable by the treaty of 1854, providing for the establishment of a permanent and specific reservation. The Lac de Flambeau reservation being such, nothing should be done which would tend to disturb or cloud that right while it exists or which might appear to evidence a greater right in the State than it really has or can get at the present time.

The only conclusion to be deduced from these authorities is that the State took the fee to this land at the date of the grant of September 28, 1850, but that its right to possession was held in abeyance until such time as the Indian right of occupancy should be surrendered by them or otherwise ended by the United States.

The suggestion of the Commissioner of Indian Affairs that in case the State still refuses to reconvey said land legal procedure be resorted to for the cancellation of the patent, does not seem feasible, in view of the legislation contained in the act of March 3, 1891 (26 Stat., 1093) amending section 8 of another act of March 3, 1891 (26 Stat., 1095) which provides, among other things, as follows:

That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents.

The limitation fixed by said act expired as to this patent more than one year ago, and hence a suit by the United States for its annulment would not be entertained.

The form in which the Commissioner of the General Land Office submitted his question as hereinbefore quoted indicates that he is inclined to the opinion that the rule announced by the supreme court

in *Weeks v. Bridgman* (159 U. S., 541) as to the effect of an erroneous certification of lands by this Department would apply with equal force in case of a patent erroneously issued. The conclusion of the court in that case rested largely, if not wholly, upon the express provision of the act of August 3, 1854 (10 Stat., 346) under which the certification there in question was issued, that—

where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, said lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

There may be cases where a patent might be treated by this Department as absolutely without effect, because issued without authority or in direct violation of law. In *Burfenning v. Chicago, St. Paul, Minneapolis and Omaha Ry. Co* (163 U. S., 321), the court, after stating the rule that in the administration of the public land system questions of fact are for the consideration of this Department and that its judgment thereon is final, uses the following language:

But it is also equally true that when by act of Congress a tract of land has been reserved from homestead and pre-emption, or dedicated to any special purpose, proceedings in the Land Department in defiance of such reservation or dedication, although culminating in a patent transfer no title, and may be challenged in an action at law. In other words the action of the Land Department cannot override the expressed will of Congress, or convey away public lands in disregard or defiance thereof.

The proposition that this Department may ignore the patents as void, or the other proposition that it may interfere in any way to dispute the right of the State thereto must rest upon the theory that the right of the State to a patent had not attached, and this because of the right of occupancy by the Indians existing at the date of the grant of 1850, and continuing up to the date of the patents. The only right the Indians had at the date of said grant was that of the Menominee tribe to remain on said lands temporarily given them by the treaty of 1848.

By joint resolution of February 1, 1853 (Gen. Laws of Wis., 1853, p. 110), the assent of the State was given "to the Menominee nation of Indians to remain on the tract of land set apart for them by the President of the United States, on the Wolf and Oconto rivers, and upon which they now reside, the same being within the State of Wisconsin aforesaid and described as follows, to wit: "Commencing at the southeast corner of township 28 north, range 19, running thence west thirty miles, thence north eighteen miles, thence east thirty miles, thence south eighteen miles to the place of beginning."

This action by the State removed all doubt as to the right of the Menominee Indians to remain upon said lands, but cannot properly be construed as a relinquishment by the State of the fee to the swamp lands within the boundaries described.

The decision of the supreme court in *Beecher v. Wetherby*, *supra*, is authority for this conclusion, it being there held that the fee to school

lands remained in the State after the date of this resolution, and that the United States had no authority to make other disposition thereof. These lands being encumbered by law with the right of occupancy by the Indians, the resolution would have no greater effect than to formally witness the recognition by the State of this right. It cannot be taken as evincing a willingness upon the State's part, that the lands should be dedicated permanently or even temporarily to any other purpose than that mentioned—the occupancy of the Menominee nation of Indians. It did not express a consent that this right of occupancy might be transferred to any other nation or tribe of Indians.

Afterwards the Menominee Indians, by treaty of February 11, 1856 (11 Stat., 679) ceded to the United States a tract of land, to be afterwards selected, which tract when selected, included within its boundaries the lands here in question. The Indians could convey no greater or better interest than they had, which was only the right of occupancy, the fee being in the State. It is true this relinquishment of their claim was coupled with the statement that it was made

for the purpose of locating thereon the Stockbridge and Munsee Indians, and such others of the New York Indians as the United States may desire to remove to the said location within two years from the ratification hereof,

but this was a mere statement not even put in the form of a condition. The effect of that relinquishment was to determine the right of occupancy in the Menominee Indians, and thereby remove the only obstacle to the merger of the right of possession with the fee. If this conclusion be correct, the right of the State to possession attached long prior to the date of the patents, and consequently those patents were not erroneously issued. The State cannot therefore be compelled to relinquish its claim to these lands, and there seems to be no course open to procure a relinquishment, unless it shall be voluntarily given. It is true the Indian allottee may have to suffer, but this comes not from the fault of the State, but from the mistake of the government in attempting to give the land to the Indian after it had conveyed the fee thereto to the State, and after the title of the State had been perfected.

While this answers the specific question in the note of reference I deem it proper to mention another phase of the matter. The act of March 3, 1893, after declaring who shall be members of said Stockbridge and Munsee tribe of Indians, makes a further provision as follows:

And all members who entered into possession of lands under the allotments of eighteen hundred and fifty-six and of eighteen hundred and seventy-one, and who by themselves or by their lawful heirs have resided on said lands continuously since, are hereby declared to be owners of such lands in fee simple, in severalty, and the government shall issue patents to them therefor.

The allotments here in question were selected by the Indians in 1856 and 1857, and must therefore have been selected under the treaty of 1856. That they entered into possession of the lands thus selected

and by themselves, or by their lawful heirs, have resided upon them continuously has been already adjudged by this Department when the allotments were approved. These tracts then seem to come within the letter of the law, declaring the Indian claimants to be the owners in fee thereof and requiring the issuance of patents to them.

The land involved in the case of *Beecher v. Wetherby*, *supra*, also came within the letter of the law directing the sale of the said two townships, but the supreme court in that case said:

The act of Congress of February 6, 1871, authorizing a sale of the townships occupied by the Stockbridge and Munsee tribes, must, therefore, be held to apply only to those portions which were outside of sections 16. It will not be supposed that Congress intended to authorize a sale of land which it had previously disposed of. The appropriation of the sections to the State, as already stated, set them apart from the mass of public property which could be subjected to sale by its direction.

So in this case the title to the tracts in question had passed out of the United States and Congress had no control over that title or authority to declare that it had vested elsewhere than in the grantee State. If the conclusion that the title had become complete in the State be correct, the issuance of patents to these allottees could have no effect upon that title, and nothing would be conveyed to the Indian thereby. It will not be presumed that Congress intended said declaration to apply to lands which had passed beyond the control of the United States, or that a patent should issue which would be without effect.

For these reasons these tracts, while seeming to come within the letter of said law of 1893, were not in fact within its terms, and hence the provision therein as to issuance of patents does not apply to said tracts.

In conclusion, I am constrained to advise you, as hereinbefore indicated, that a relinquishment of the lands in question can only be procured through the voluntary act of the State of Wisconsin, and that a cancellation of the patents heretofore issued to that State for these lands, can not be obtained by suit.

Approved, July 12, 1897.

C. N. BLISS, *Secretary*.

MINING CLAIM—PROTEST—PLACER—NOTICE—EXPENDITURE.

ADAMS ET AL. v. QUIJADA ET AL.

The issue raised is solely between the government and the entryman, in case of a hearing on a protest against a mineral entry, in which no interest in the land involved is alleged or shown on the part of protestant, prior to the application for patent.

The fact that lode claims have been located on a tract of land, and subsequently abandoned, can not affect the good faith of a placer applicant for the same land.

A misstatement in the published notice of an application for a placer patent, as to the mining district in which the land is situated, is not fatal to the notice, where the land is accurately described by legal sub-divisions, and otherwise identified. The proof as to expenditure should so itemize the improvements that it can be ascertained therefrom what proportion of the sum expended is included in each item.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (P. J. C.)

On October 22, 1892, David Quijada made application for patent for the Blue Mountain placer mining claim, located by legal subdivisions, embracing the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13; the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 24, T. 2 N., R. 11 E.; lot 1 of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 2 N., R. 12 E., M. D. M., Stockton, California, land district, and described as being in Calaveras mining district. No protest or adverse claim was filed during the period of publication, and on January 12, 1895, he made mineral entry No. 443 for the land.

The location of this placer claim was originally made by Quijada and seven other persons, but the title of the others had passed to him by deed before asking the application for patent, and he subsequently conveyed the same to Jackson D. McCarty.

On January 29, 1895, the local office transmitted to your office the affidavits of three of the original locators, in which they state that their names were used as locators without any authority, and that their subsequent deed was without consideration.

On March 7, 1895, James Adams *et al.* filed a protest against the entry, alleging (1) that the land was not placer mining ground; (2) that no placer mining had been done on any part of the land "for a great many years last past"; (3) that the entryman or his grantors have made no improvements thereon; (4) "that there are many valuable gold bearing quartz ledges running through and across" the land, which were known to the entryman at the time he made his application for patent; (5) that the "quartz mines or ledges" were actually being worked and developed at the time; (6) that there is no such mining district as Calaveras, but the land is situated in the Madam Felix mining district; and (7) "that said application was made with a view to obtain possession and patent to valid quartz mining ledges and to defraud the government thereof."

By letter of April 25, 1895, your office held that the affidavits of the original locators "do not warrant any investigation by this office, and, considered as protests, they are hereby dismissed;" and on the protest of Adams *et al.* it was determined

that you (the local officers) should notify the protestants that they or any of them will be allowed thirty days from notice hereof, within which to apply for notice of a hearing.

Pursuant to this order, Adams *et al.* formally asked for a hearing, (1) "on the ground of fraud in making said entry by said entryman";

(2) that the lands are quartz mining, and not placer, and contain "well defined ledges and lodes of quartz in place, bearing gold"; (3) that the land "has been worked as quartz mining claim"; and (4) that the entry was made in the interest of McCarty.

A hearing was ordered and had before the local officers, and as a result they found—

That the fact is established by a great preponderance of evidence that the Blue Mountain placer mining claim, so-called, is not placer mining ground, but that it is valuable for quartz mining; that the entire proceedings by the defendant in this case, having in view the procuring of a government patent for the Blue Mountain placer mining claim have been characterized by bad faith and *gross fraud*: In view of which facts we recommend that the application for patent for the Blue Mountain placer mining claim be rejected.

On appeal your office affirmed the action of the local officers, deciding that it is shown: (1) That two or three small gulches on the land in controversy have been worked, many years ago, as placer mines, but that the same were exhausted, and that, as a present fact, the land has no value for placer mining purposes; (2) that Quijada, or his grantors, had not expended \$500 on the land in improvements; and (3)

that several well defined mineral bearing veins of quartz extend into and across the land in controversy, but the evidence does not affirmatively and satisfactorily show that, as a present fact, these veins have been sufficiently developed to show that they can be operated with profit, nor is it shown that these veins are sufficiently rich to warrant miners of ordinary prudence and sagacity in expending their means and labor in an effort to develop them.

Whereupon the case now comes before the Department on the appeal of McCarty, and numerous errors of both law and fact are assigned.

It will be observed that the affidavit of contest upon which your office ordered a hearing does not allege any interest in the land in controversy, or any part thereof, in either of the protestants. This is also true of the affidavit that was filed before the local officers, under order from your office, and upon which the hearing was ordered. It may be further stated at this time, that the evidence taken at the hearing does not disclose any interest in either of the protestants, to any part of the land included in the Blue Mountain placer claim, prior to the application for patent for the same. Whatever question there may be, therefore, in this matter, in relation to compliance with the law on the part of the placer claimants, or otherwise, is simply a question between the government and the entryman. The protestants alleging no interest in themselves, and failing to show that any existed at or prior to the time of the application for patent, they are necessarily without interest in this controversy, and their testimony can only be used for the purpose of ascertaining whether or not there has been a compliance with the law on the part of the placer applicants.

The testimony in this case is very voluminous, and contains very much that is entirely irrelevant to any issue that might have been raised in connection with the issuance of patent to the placer claim-

ants. It may be said that the theory of the protestants is, that inasmuch as there is, in the southern part of section 19, and the northern part of section 30, some quartz mines that have been developed, and that by reason of quartz croppings, which appear on the surface extending northwest from these mines and in the direction of the placer claim, the land in controversy is also valuable for quartz mining purposes. The fact is, however, as shown by the testimony, that this immediate district has been known for its placer and quartz mines for a great many years; that placer workings have been, in the early days of the history of California, carried on to a considerable extent on and in the immediate vicinity of what is now known as the Blue Mountain placer claim; and that there have been no workings or developments upon any part of the ground adjoining or in close proximity to the Blue Mountain placer by which there has ever been disclosed any mineral that would pay for working, or upon which there existed, at the time the placer application was filed, any location. It is true that after the application for patent had been made, and the period of publication had ended, there was an attempt made by some parties to locate some two or three claims south of a part of the land in controversy, which claims lap over onto the placer claims; but it is not shown that these locations were ever perfected; neither is it shown, by any satisfactory evidence, that there was any discovery of mineral that would entitle them to the locations, or that there was any work done with a view to developing the property to ascertain whether or not mineral existed in paying quantities.

Much stress is laid upon the fact that McCarty and another, in 1884, located two or three lode claims upon the land in controversy. It is shown that they did considerable work upon one of them, at least, for the purpose of developing a lode, if any existed, and that the same was abandoned as worthless, and remained so for some time before the location of the placer claim.

The fact that there have been lode claims thus located and abandoned upon the land now sought under the placer mining laws, is no objection whatever, and does not indicate any fraud or lack of good faith upon the part of the placer applicants. (*United States v. Iron Silver Mining Co.*, 128 U. S., 673-681.)

It is very clear to my mind that if this land possesses any value for mining purposes at all, it is for placer mining. It possesses no value for agricultural purposes, and the evidence is not sufficient to overcome the *prima facie* showing of its character as placer. At all events, it can not be disputed that it is not shown by the evidence that any mineral has ever been extracted, or that any work has been done looking toward producing any ore, from any quartz mines or veins within the boundaries of the placer claim, excepting, perhaps, such as was done by McCarty as above stated.

The charge of fraud on the part of Quijada in procuring this entry

in the interest of McCarty, is not, in my judgment, sustained by the testimony. Neither Quijada nor McCarty appeared as a witness on the stand, although McCarty was present at the trial. The only testimony on the point of fraudulent conduct, is that Quijada was an "ignorant sheep herder", in the employ of McCarty, and he and others made the locations, and that Quijada afterwards made application for patent and final entry, when he conveyed the property to McCarty. It is also charged that some of his co-locators were ignorant of the fact that their names had been used in making the location; but if it be conceded that they were not cognizant of the fact that their names had been used in making the location, they certainly ratified any act that may have been done in that direction by subsequently making a deed to Quijada for their interests.

The fact that in the publication notice the property was described as being in Calaveras mining district, is not, in my judgment, under the circumstances in this case, fatal to the publication notice. The land is otherwise accurately described by legal subdivisions, is said to be in the county of Calaveras, in the State of California, and the place of the record of the same is given as in the recorder's office of Calaveras county. Your office did not deem this a fatal defect, as by letter of August 25, 1895, Quijada was required to furnish satisfactory evidence of what mining district, if any, his claim was situated in.

There is one other point in connection with this matter, and that is, as to the amount of the improvements on the placer claim, as reported by the witnesses. They state in their affidavit, accompanying the application for patent, that "said improvements consist of reservoirs and ditches and mining tools on said claim; also tail race"; and that their value is not less than \$500.

It may be doubted whether this statement of the improvements is sufficiently full and explicit to show the statutory amount of expenditure. Mining tools could hardly be considered as part of the expenditure that is demanded, and it would seem to be better form for the witness to itemize the improvements, so that it could be ascertained with a reasonable degree of accuracy, by your office, what proportion of the \$500 was included in the reservoirs, ditches, etc., and what in mining tools. The attention of your office is directed to this point, and such action should be taken in reference thereto as may be deemed advisable, giving the applicant an opportunity, if he so desires, to show the improvements that existed at the time the application was made, and their value.

Your office judgment is reversed.

REPAYMENT—PRE-EMPTION ENTRY.

FELIX MCGINN.

No right of repayment exists where a pre-emption entry is canceled on account of the pre-emptor having prior thereto exercised his pre-emption right, and the record shows that he swore falsely, in support of his second entry, that he had never had the benefit of the pre-emption law.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (J. L.)

I am in receipt of a letter of June 11, 1897, from the attorneys of Felix McGinn, enclosing an application by the latter dated May 15, 1897, alleging that he is the only surviving heir of John McGinn deceased, and asking "for repayment of the purchase money paid on entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of section 1, T. 7 N., R. 4 W., as per cash certificate No. 567 issued at Helena, Montana, bearing date the 13th day of October, 1875"; and enclosing also a letter from the Assistant Commissioner of the General Land Office addressed to said attorneys, rejecting said application and returning the same to them.

It appears that John McGinn deceased, on October 13, 1875, made pre-emption cash entry of the one hundred and twenty acres of land above described, and that said entry was canceled by the Commissioner of the General Land Office on February 26, 1877, in obedience to a departmental decision of February 22, 1877.

Harvey Spalding and Sons, attorneys now presenting this claim, in their letter of June 11, 1897, aforesaid, say:

Upon reference to the Department decision of February 22, mentioned in the Commissioner's letter above quoted, it appears that the sole question considered in the decision, and the sole ground mentioned for the cancellation of the entry is the conflict with the grant to the Northern Pacific Company.

The reference invited shows exactly the contrary.

On June 27, 1876, the Commissioner of the General Land Office held for cancellation John McGinn's entry aforesaid, the sole reason therefor being stated as follows:

The records of this office showing that he made pre-emption location at Dakota City, Nebraska, November 27, 1858, with M. B. Ld. Wt. 52,887—160 a, Act 55, R. and R. 35 covering SW. $\frac{1}{4}$ 14, 29, 7 E., 6th p. m., and that the same was patented to him June 1, 1861.

Sec. 10 act 4th Sept. 1841, and Sec. 2261 R. S., of U. S., provides that "No person shall be entitled to more than one pre-emption right."

The departmental decision of February 22, 1877, in disposing of McGinn's appeal from the Commissioner's decision of June 27, 1876, simply said:

The facts are correctly stated by you, and your decision, for the reasons stated therein, is affirmed.

The brief of argument filed in that case on behalf of the Northern Pacific Railroad Company expressly admitted that McGinn's rights as

a settler were superior to the company's rights under its grant, if McGinn were a qualified pre-emptor; and the proofs compelled the admission.

The claim that McGinn's second entry was canceled for conflict requires no further attention.

The records show that John McGinn had made a previous pre-emption cash entry as found by the Commissioner's decision; and that, nevertheless, McGinn, on October 13, 1875, in support of his second pre-emption cash entry, had made oath, "that I have never had the benefit of any right of pre-emption under this act;" meaning the act of September 4, 1841, as re-enacted in sections 2259, 2260, 2261 and 2262 of the Revised Statutes.

Section 2262 of the Revised Statutes provided that:

Before any person claiming the benefit of this chapter is allowed to enter lands, he shall make oath before the receiver or register of the land district in which the land is situated, that he has never had the benefit of any right of pre-emption under section twenty-two hundred and fifty-nine; . . . and if any person taking such oath swears falsely in the premises, he shall forfeit the money which he may have paid for such land, and all right and title to the same.

John McGinn's entry was canceled in obedience to this statute. An application for repayment of money thus forfeited cannot be entertained.

It seems that in the year 1877, John McGinn in his lifetime, applied for re payment of the purchase money under section 2362 of the Revised Statutes, which was then the law in force. On December 4, 1878, the Commissioner of the General Land Office by a letter addressed to Hon. Martin Maginnis, then a delegate in Congress from Montana Territory, declined to recommend the re-payment of the money paid by McGinn, and referred to section 2262 of the Revised Statutes hereinbefore quoted, as a conclusive limitation of the authority of the administrative branch of the government in such cases.

The action of the General Land Office in respect to the application of Felix McGinn, the alleged only surviving heir of John McGinn deceased, is hereby approved, and said application is hereby rejected. You will serve upon said attorneys a copy of this letter.

REPAYMENT—FORFEITED RAILROAD LANDS.

CRAYTON P. BRYANT.

A purchaser of forfeited railroad lands under section 3, act of September 29, 1890, is not entitled to repayment where his entry is properly allowed on the proof presented, but is subsequently canceled on account of the falsity of said proof in a matter essential to the allowance of the entry.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (C. J. G.)

On July 26, 1893, Crayton P. Bryant made cash entry No. 19396 for lots 1, 2, 5 and 12, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 33, T. 15 S., R. 7 E., San Francisco land district, California.

This land was embraced within the grant to the Southern Pacific Railroad Company and was thereafter forfeited.

In his application to purchase presented to the local office August 22, 1892, Bryant stated:

I purchased the said land of one Burns who filed with the railroad company in 1887, with the *bona fide* intention to secure title thereto by purchase from the Southern Pacific Railroad Company when earned by it by compliance with the conditions or requirements of the granting act of Congress.

In his final proof submitted to the local office July 26, 1893, Bryant stated:

Have not lived on the land. In 1888 I bought the right of one Burns who had made R. R. filing in 1887 and I took possession with the *bona fide* intention of purchasing from the S. P. R. R. Co. when they had earned title under the conditions of their grant. I went there under the printed invitation of the R. R. to settlers.

The proof was accepted by the local officers, the purchase money paid by the entryman, and the entry allowed.

By letter of September 5, 1894, your office directed the local officers to require the entryman to substantiate his statement that Burns had filed with the railroad company in 1887, and had thereafter transferred the land to the entryman.

May 17, 1895, the entryman, declaring his inability to substantiate his representation that Burns had filed upon the land with the railroad company in 1887, surrendered his receiver's receipt, executed a relinquishment of all claims to the land, and made application for repayment of the purchase money.

These papers were transmitted by the local office to your office, whereupon the entry was canceled and the application for repayment held for further consideration.

July 9, 1895, your office denied the application for repayment.

The entryman filed a motion for review of your said office decision denying the application for repayment, and also an application for reinstatement of a portion of his cash entry. In support of this application for reinstatement the entryman furnished a copy of his grantor's application, dated April 21, 1888, to purchase this land from the Southern Pacific Railroad Company, and in an affidavit accompanying the same says, referring to your office letter of September 5, 1894—

I was informed thereby that it was necessary for me to furnish testimony that Burns's application to the R. R. Co. was before 1888. This I could not do as Burns's application was after 1888.

February 4, 1896, your office denied the motion for review as well as the application for reinstatement.

Appeal is made to this Department, but no error is assigned on the denial of the application for reinstatement.

Bryant's cash entry was made under the third section of the act of September 29, 1890 (26 Stat., 496), which, as applied to this case,

describes the persons who may make purchase thereunder in the following language:

Persons in possession under deed, written contract, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight.

This statute was discussed and fully construed in *Eastman v. Wiseman* (18 L. D., 337) and *Moore v. McGuire* (21 L. D., 392).

It is clear from the foregoing statement that Burns was not, in contemplation of the act of September 29, 1890, *supra*, a licensee of the railroad company, because even his application to purchase was not made prior to January 1, 1888. The entryman herein, by his purchase from Burns, acquired no better right than was possessed by the latter.

The entryman was not entitled to make cash entry under the statute named, but his entry was not "erroneously allowed." Its allowance was secured by Bryant upon his express representation and statement that his grantor (Burns) had made application to the railroad company in 1887 to purchase, and had thereby become the licensee of that company. The local office was not responsible for this representation and statement; it was the act of the entryman, made for the purpose of securing the allowance of his entry, and he alone was responsible for any error therein. The error here shown was not in the allowance of the entry by the local officers, but was in the proof presented by the entryman.

The subsequent affidavit of the entryman shows that the statement made in the application to purchase and in the final proof was untrue. That statement was an essential one in the proofs presented, because without it the entry could not have been allowed. Had the entryman correctly stated the time when his grantor, Burns, filed with the railroad company, the proofs would not have been accepted, payment would not have been permitted, and the entry would not have been allowed.

The entryman earnestly attempts to explain his conduct on the theory that he was laboring under a reasonable misapprehension as to the law, but he makes no endeavor to explain his misstatement of the facts.

Repayments of purchase money can only be made in pursuance of law, and this case is not of the character described in the repayment statute.

Your office decision is affirmed.

DESERT LANDS -ACT OF AUGUST 18, 1894—CONTRACT.

STATE OF WASHINGTON.

Under the provisions of the State statute accepting the terms of the desert land act of August 18, 1894, a contract on behalf of the State, with the United States, executed by the Commissioner of Arid Lands for said State, is not valid if not approved by the governor and attorney-general of said State.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (J. I. P.)

I am in receipt of your office letter "F" of the 19th ultimo, submitting a map, lists, two contracts and other papers, filed on behalf of the State of Washington, under Sec. 4 of the act of August 18, 1894 (23 Stat. 372-422), designating for segregation certain lands to be irrigated from the Natchez and Columbia River Irrigation Canal, aggregating 6654.59 acres. After calling my attention to certain typographical errors in the contracts (marked in pencil) which do not affect its meaning, you direct my attention to the fact that the contract submitted on behalf of the State is signed by the "Commissioner of Arid Lands" for said State, but is not approved by the governor and attorney-general. You refer to the proviso to section 3 of the act of the state legislature of Washington, approved March 22, 1895, accepting the provisions of the "Carey act," and being in doubt as to the validity of said contract, you submit it for my consideration.

Section 3 of the Washington act, above referred to, after defining and prescribing the duties of the commissioner of arid lands, provides

and he is further empowered to contract for the construction of ditches and canals, the building of dams and reservoirs, the irrigation, reclamation, settlement and sale of said arid lands, and to do and perform any and all things necessary to be done in carrying into effect the objects of this act: *Provided*, that no contract or sale made by said commissioner of arid lands shall be in force and effect until the same shall be approved by the governor and attorney general.

Section 4 of said act, after prescribing certain further duties of the commissioner of arid lands, provides that he

shall take all necessary steps on behalf of the State to secure a contract binding on the United States to donate, grant, and patent to this State or its assigns the said arid lands etc.

I am aware that under the general rule governing the construction of a proviso, it must be construed in connection with the section of which it forms a part, and that it does not apply to other sections unless "plainly intended so to do." (Sutherland on Statutory Construction, Sec. 223). But in this case I think the "plain intent" of the Washington legislature, that the proviso to Sec. 3 of said act should apply to any contract made by the commissioner of arid lands, is apparent.

The commissioner of arid lands is vested by the act in question with authority to make on behalf of the State two classes of contracts: one

to secure to the State from the United States the lands contemplated by the "Carey act" of August 18, 1894 (*supra*); and the other to dispose of said lands for the purpose of irrigation and reclamation. It is of primal importance to the State, that the first class of contracts should be properly executed, for if they were not the second class of contracts would avail nothing, and of this the legislature was unquestionably aware. And when, in the proviso to the 3rd section of said act, it was declared that *no contract or sale made by said Commissioner etc. shall be in force and effect until the same shall be approved by the governor and attorney general*, it meant both classes of contracts herein mentioned. It in short meant any contract that said commissioner might make in reference to the acquisition or disposal of said lands by the State of Washington.

As the contract transmitted by your letter "F" of the 19th ultimo is not approved by the governor and attorney general of Washington, it is returned herewith without action together with the other papers in the case.

The recommendation made by you in the last paragraph of your letter of the 19th ultimo, relative to the amendment of the forms and the contract in the circular of November 22, 1894, will be made the subject of a separate communication.

PRACTICE—NOTICE OF DECISION—ATTORNEY—APPEAL.

WALKER *v.* GWIN.

Service of a notice of a decision upon an attorney of record is notice to the party he represents.

Where a party is represented by two attorneys of record, and one of said attorneys accepts service of a notice of decision, such party will not be heard to plead a private understanding between himself and his attorneys under which all notices were to be served on the other attorney.

The Department is without jurisdiction to entertain an appeal if notice thereof is not filed and served within the time provided in the Rules of Practice.

Secretary Bliss to the Commissioner of the General Land Office, July 12,
(W. V. D.) 1897. (E. B., JR.)

This is a motion to dismiss the appeal of Charles L. Walker, in the case of said Walker *v.* Austin B. Gwin.

On December 7, 1896, in that case, involving the SE. $\frac{1}{4}$ of section 29, T. 20 N., R. 8 E., Perry, Oklahoma, land district, your office, affirming the decision of the local office, held that Walker, although the prior settler, had failed to reside upon the land as required by law, and that therefore the right of Gwin to the land under his soldier's declaratory statement filed October 3, 1893, and his entry March 29, 1894, and due residence and improvement, was superior to that of Walker, and awarded the land to Gwin. On March 24, 1897, Jno. A. Oliphant, as attorney for Walker, filed and served on Gwin's attorney an appeal

from the decision of your office. On June 5, 1897, Gwin filed a motion to dismiss the appeal on the ground that the same was not filed, nor a copy thereof served on the appellee or his attorney, within sixty days from personal service of notice of your office decision, as required by the rules of practice.

It appears that Walker was represented at the trial of the case by two attorneys—one of whom was said Oliphant, and the other one L. P. Hudson. In the record is found the following acceptance of notice of your office decision:

Before the United States Land Office, Perry, Okla., Dec. 30th, 1896.

CHARLES L. WALKER	} Involving the SE. $\frac{1}{4}$ Sec. 29, T. 20 N., R. 8 E., I. M
v.	
AUSTIN B. GWIN.	

We hereby accept service of Commissioner's letter "H", A. B. W., of December 7th, 1896, in the above entitled case, in favor of Gwin, and the receipt of a copy of said letter is hereby acknowledged, together with the right of appeal therefrom within sixty days from this 30, day of December, 1896.

Dec. 31, 1896.

L. P. HUDSON,
Atty. for Walker.
MORRIS & KELLOGG,
Attys. for Gwin.

This was clearly notice to Walker of said decision, if Hudson was at the time of the acceptance still his attorney of record (*Yeoman v. DeRoche*, 22 L. D., 24).

With the appeal there was filed an affidavit by Walker stating—

That he is the contestant above named; that John A. Oliphant was and now is the chief counsel in his behalf since the filing of said contest, and the atty who had charge in person of his said contest and upon whom all notices and orders were to be served, and to whom I looked for information as to what I should do and the absolute management of said contest; that L. P. Hudson was only employed to assist my said atty in the trial of said contest and was not to have the care and management of said contest thereafter; that the decision of the Hon. Commissioner as made in this contest was served on said Hudson, as the record shows, who neglected to notify this contestant of the same, and that this contestant did not find out about the same until after the time for an appeal had expired, and then only through his contestant; that he inquired before said time was up, and was informed no decision had been made at said Land Office; that affiant if defeated before the Hon. Commissioner in said contest had intended to appeal, and had so instructed his said atty Jno. A. Oliphant; that he would have done so had he been so notified; that he relied on said Oliphant having the notice served on him of such decision when made, so that an appeal could be taken if desired; that affiant desires to appeal and feels he has a prior and better right to said land and therefore asks that such right be granted.

With the appeal there was also filed an affidavit by Oliphant stating—

That he has had charge of the contestant's cause ever since said contest was commenced; that he has endeavored at all times to give the same his personal attention; that said Hudson was employed to aid him in the trial of said contest, but that affiant expected and so instructed that all notices and decisions in said contest be made on him; that affiant had no knowledge that said contest had been decided until the

fact had been written him by contestant, and that on going to the land office, found that the time had expired to take an appeal to the Hon. Secretary; that said contestant had requested an appeal be taken in case a decision was rendered against him, and would have done so had he known of the same in time.

While these affidavits tend to show that Walker and his attorney Oliphant understood between themselves that the latter was to be chief counsel for the former, they do not show that Hudson was not Walker's attorney of record at the time of the above acceptance of notice, nor that there was any such limitation upon Hudson's authority as attorney as would preclude such acceptance from binding Walker in the premises. It is significant that no explanatory affidavit of Hudson has been filed in behalf of Walker. Walker does not state that Hudson's attorneyship in his case ceased with the close of the trial or that it has yet ceased. The appeal from the decision of the local office to your office in behalf of Walker is signed by both Oliphant and Hudson as "Attys. for Pltff.", and thus signed was served upon Gwin's attorneys, and the service by them accepted. Furthermore, M. C. Latta, clerk in charge of the contest docket and papers in the local office, in an affidavit filed with said motion, swears positively that he "verbally" informed said Oliphant of said decision and of the fact that formal notice thereof had been given to Hudson, soon after such notice was given, and that to all this Oliphant "responded 'All right', or words to that effect."

The local officers were not notified of any limitation upon Hudson's attorneyship, nor that his attorneyship had ceased prior to the said acceptance. A party can not, based merely upon an alleged private understanding between himself and one, or even both, of his attorneys of record, limit the ordinary functions of one of them so as to avail himself of all the advantageous consequences of the relation of client and attorney, and, also, solely at his own election, avoid the consequences of that relation when they are adverse to him, to the prejudice of the rights of his adversary. Service of notice was evidently made in good faith upon Hudson and so accepted by him. So far as the record discloses, he was then still Walker's attorney, and the acceptance within the scope of his authority. Notice to him was notice to Oliphant and Walker (Rule 106). If he was recreant, failing, as alleged, to notify his client or to take the necessary steps to secure the right of appeal, that is a matter not for the Department, but solely between him and his client.

Notice of the appeal was not filed and served in time (Rule 86) and hence the Department is without jurisdiction under its rule to entertain the same (*Van Dyke v. Lehrbass*, 24 L. D., 322).

The motion is allowed and the appeal dismissed.

SETTLEMENT RIGHTS—RELINQUISHMENT.

SPRING *v.* REINBOLD ET AL.

Settlement on land covered by the subsisting entry of another confers no right as against the record entryman, but as between settlers on land thus reserved the settlement first in time, other things being equal, is entitled to precedence, on the relinquishment of the record entry.

Secretary Bliss to the Commissioner of the General Land Office, July 15,
(W. V. D.) 1897. (C. W. P.)

This is an appeal by Frank Spring from the decision of your office, dated April 4, 1896, in the case of said Spring *v.* Adam Reinbold and Gabriel Markvart, involving the NW. $\frac{1}{4}$ of section 1, township 124 N., range 73 W., Aberdeen land district, South Dakota.

The record history of the case is fully stated in your office decision, and need not be now repeated.

On December 20, 1888, Gabriel Markvart made homestead entry No. 7505 of said land.

On October 1, 1895, the local officers received by mail Adam Reinbold's affidavit of contest against said entry. Subsequently, on the same day, Frank Spring filed an affidavit of contest. Reinbold, in his affidavit, charged that Markvart

has wholly abandoned said entry, and has sold his buildings and improvements thereon to said contestant, and delivered to him his receiver's receipt No. 7505 for said tract, and agreed to execute a relinquishment for his homestead entry, and deliver the same to said contestant, but failed to do so before leaving the State of South Dakota; that he is now a non-resident of this State, and has changed his residence therefrom; that the said claimant has given me full possession of said premises and all the buildings thereon, and that said tract is now my home exclusive of all others.

Spring, in his affidavit, alleged abandonment and change of residence, and that the land is not cultivated as required by law; and further charged

that claimant has left the State of South Dakota and wholly abandoned said tract; that his family have wholly abandoned the tract and sold all improvements thereon; and that claimant has sold a relinquishment of said tract.

No hearing was had on these contests, but on November 5, 1895, Reinbold presented at the local office Markvart's relinquishment, executed November 2, 1895. Markvart's entry was thereupon canceled and Reinbold permitted to make homestead entry, No. 9887, of the land. On November 11, 1895, Spring made homestead application for the same, and with his application filed an affidavit, in which he alleged that he had made improvements on the land in question in the latter part of October, 1895, and

that he has followed up said improvements by residing on said tract more or less of the time since to date hereof. That he was living on the tract above on the night of November 4th and slept thereon, that he further slept on said tract for several

nights immediately prior to said November 4, 1895, and especially has endeavored to make said tract his home in so far as he was able within the last few weeks, and has made improvements thereon. That he was residing on said tract on Tuesday, the 5th of November, 1895, most of said day, that he was living and working on said tract during the said fifth of November, A. D. 1895,

and applied for a hearing thereon, which was denied. Spring appealed. Your office affirmed the ruling of the local officers.

Reinbold, in his affidavit of contest, received at the local office on October 1, 1895, alleges that Markvart "has given me (him) full possession of said premises and all his buildings thereon, and that said tract is now my (his) home, exclusive of all others," and Spring only alleges that he had made improvements on the land in the latter part of October, 1895, and has followed up said improvements by residing on the land "more or less of the time since to date hereof."

It is a well settled principle that as against a record entry a subsequent settler can acquire no rights by virtue of his settlement; but as between settlers subsequent to the date of the entry, the settlement first made in point of time, other things being equal, is entitled to the higher consideration, as soon as the entry is relinquished. (*Hall v. Levy*, 11 L. D., 284; *Geer v. Farrington*, 4 L. D., 410.)

Spring's application for a hearing does not allege priority of settlement as against Reinbold and was therefore properly denied, but this denial should be without prejudice to any claim that may hereafter be made on the ground of priority of settlement.

Your office decision is modified accordingly.

RAILROAD GRANT—WITHDRAWAL—ADJUSTMENT.

RUHGA ET AL. *v.* THE BURLINGTON AND MISSOURI RIVER R. R. CO.

The lands on the south side of the Burlington and Missouri road, where the grant is deficient, that were subject to the grant at definite location, are not open to entry, but must remain in reservation, subject to such action as may be required on the termination of the judicial proceedings now pending with respect to the excess of lands received by said company on the north side of its road.

Secretary Bliss to the Commissioner of the General Land Office, July 15,
(W. V. D.) 1897. (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of section 29, T. 10 N., R. 12 E., Lincoln land district, Nebraska.

The record shows that on March 22, 1884, the local officers rejected the applications of Charles Ruhga and Benjamin Betts to make pre-emption filing for the above described tract. The application of Ruhga was for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and that of Betts for the W. $\frac{1}{2}$ of the same quarter section. These applications were offered, and rejected on the same day by the local officers.

Ruhga alleges that he moved upon the land in 1875, having purchased the improvements of one Isaac Moore for \$500.00, and that he has since continuously resided thereon and has valuable improvements on the land; that in 1878 he employed and paid an attorney to secure a homestead entry of the land (the said E. $\frac{1}{2}$ of the quarter-section) for him, but said attorney failed and neglected to do so, and he asks that a hearing be ordered to determine the truthfulness of the allegations made by him.

Betts sets forth that he first began improvements upon the land claimed (the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$) by him, in 1869, and moved thereto and established his residence thereon in 1870, and has continued to live there ever since; that he, also, has valuable improvements, and that he employed the same attorney as Ruhga to secure a homestead entry of the land for him (Betts), which attorney failed and neglected to do so; and he asks that a hearing be granted him in order to prove his allegations.

February 24, 1896, your office decision was rendered, wherein it was held that the land was withdrawn for the benefit of the Burlington and Missouri River Railroad, and you, therefore, rejected the applications of these appellants.

It appears from your said office decision, that these tracts are within the limits of the grant to aid in the construction of the said road, under the act of Congress of July 2, 1864 (13 Stat., 356), the rights of which company attached June 22, 1865, and on account of which withdrawal was made February 14, 1866.

July 6, 1867, the State of Nebraska selected this land for school purposes, which selection was canceled by your office decision of December 11, 1877, on account of conflict with the rights of said railroad.

November 15, 1878, the Burlington and Missouri River Railroad Company applied to list this land, but, owing to the failure of the then local officers to certify the same, no action was taken thereon.

The decision from which appeal is taken, held that though this company had received more land than it is entitled to, such excess exists on the north side of the road as constructed and, as the land now sought to be entered by these appellants lies south of said road, it cannot now be said that it may not be needed in satisfaction of the grant; especially, as suit is now pending in the courts—having been brought at the instance of the Department—to recover the excess heretofore so erroneously conveyed to the defendant.

In the case of *Chapman et al. v. Burlington and Missouri River Railroad Company* (20 L. D., 496), it was held (syllabus):

The grant to this company in the State of Nebraska contemplates that one-half of the land granted shall be taken on each side of the road; but in the adjustment of said grant the company has received more lands than it is entitled to, the excess lying on the north side of the road, and although suit is pending for the recovery of said excess, and that under the act of March 3, 1887, no more lands can be patented to the company, yet lands on the south side of said road, where the grant is deficient,

that were subject to the grant at definite location, are not open to entry, but must remain in reservation, subject to such further disposition as the action of the court on the suit to recover may seem to require.

This case appears to dispose of the one at bar. It is in all essential respects similar, and, under its authority, the decision appealed from is affirmed.

No allegation of settlement is made by either of the appellants, prior to either the attachment of the rights of this defendant, to wit, June 22, 1865, or the time when the withdrawal became effective February 14, 1866.

SCHOOL LAND-INDEMNITY SELECTION-RESERVATION.

STATE OF CALIFORNIA.

An application of the State to select school indemnity, on a basis of an alleged loss of unsurveyed lands within a timber reservation, prior to an official determination of the number of townships included in said reservation, may be accepted and treated as valid, not in recognition of any such right on the part of the State but as a matter within departmental discretion, where no good reason exists for adopting a different course.

Secretary Bliss to the Commissioner of the General Land Office, July 15,
(W. V. D.) 1897. (W. A. E.)

On April 29, 1897, the Department referred to your office for report a letter from Mr. F. A. Hyde, relative to certain school indemnity selections in the State of California.

These selections were based upon unsurveyed lands alleged to have been lost by reason of the timber reservations established by executive orders of February 22, 1897.

It was stated by Mr. Hyde that said selections were suspended under the supposed requirements of an order from the Department temporarily suspending all proceedings under the forest reservations of February 22, 1897, and that as California is placed on a different footing from the other States under the instructions of July 23, 1885 (4 L. D., 79), an indefinite suspension of applications to select school lands would prove a serious matter to locators in said State.

Your office letter of May 15, 1897, reports that:

There has been no order from the Department directing suspension, but action has been deferred in cases where applications to select indemnity lands have been filed based upon unsurveyed lands alleged to have been lost by reason of the reservations established by executive orders of February 22, 1897, until the status of such reserved lands and the State's present right to select indemnity for losses occasioned thereby could be satisfactorily determined.

It is further stated that:

Section 2275 U. S. R. S. amended February 28, 1891 (26 Stat., 796), provides, that "it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indem-

nity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein," and the question arises, can a valid selection be made upon a basis of reserved lands in advance of an official determination as to the number of townships included in such reservation. It is true, that in cases of permanent reservations, where selections have been made on the basis of townships apparently within a reservation, the selections have been permitted to stand upon ascertaining that the loss actually existed, the protraction of the township lines being considered a mere ministerial function; and while I am inclined to believe that such is the true principle to be observed with regard to permanent reservations, it does not apply with the same force to reservations temporary in character, or concerning which further executive or legislative action is contemplated or required.

The timber reservations created by executive orders of February 22, 1897, were intended to be permanent in character, but some dissatisfaction having been occasioned thereby, the matter was taken up by Congress, and at the time your office letter was written there was pending before Congress a bill providing for the modification of said orders.

On June 4, 1897, an act, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," was approved. Said act provides:

That the executive orders and proclamations, dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

It thus appears that the action contemplated by Congress in regard to the timber reservations created by executive orders of February 22, 1897, has now been taken, and that such action does not affect the timber reservations established by said orders in the State of California, which remain as originally created.

The status of the lands included within these reservations in the State of California has apparently, then, been fixed, and the first reason assigned by your office for deferring action on the applications of the State to select indemnity for unsurveyed school sections included within such reservations has been removed.

The sole remaining question for consideration, therefore, is whether a valid selection can be made upon a basis of reserved lands in advance of an official determination as to the number of townships included in such reservations.

Section 2275 of the Revised Statutes of the United States, as amended by the act of February 28, 1891, reads, in part, as follows:

And other lands of equal acreage are also hereby appropriated and granted and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or

are otherwise disposed of by the United States. . . . And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservation, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein.

Under a strict construction of this section it would seem that the right to select indemnity for school lands lost by reason of such reservations does not accrue to the State until after an official determination by the Secretary of the Interior as to the number of townships included within the reservations.

It appears, however, that the Department has heretofore treated the order of procedure given in said section as directory rather than mandatory, and that it has been the custom for the State to take the initiatory step where the reservation is connected with the public surveys, so that the calculation as to what townships would fall within said reservation, if the surveys were extended, is a simple matter. In such case the State files its application to select a certain tract, naming as basis an unsurveyed school section which would fall within the reservation if the lines of survey were extended. If it appears, after examination, that the tract named as basis is actually lost to the State by reason of the reservation, and there are no adverse claims to the tract selected as indemnity, the application is approved.

This method saves time and enables the State to select indemnity lands earlier than it could if it had to wait until after the Department had officially determined the number of townships included in the reservation. The application to select indemnity being on file at the time the official determination is made, the official determination and the approval of the application are practically simultaneous. So far as the United States are concerned, it makes little difference whether this official determination is made before or after the State files its application to select indemnity. There is a practical advantage to the State, however, in having its application to select indemnity on file at the time the official determination is made.

There seems to be no good reason why the practice heretofore followed by the Department should not be continued. The amendatory act of February 28, 1891, aims to facilitate the selection of indemnity by the State, not to delay it. Thus, the Commissioner of the General Land Office, in his report upon the bill which afterwards became the act of February 28, 1891, said:

The purpose of the proposed legislation is to enable the proper selection of indemnity to be made at once, while good lands can be had for selection, before the time, more or less distant, when actual surveys of the reservations will be made, and when it is a matter of course that the good lands will be generally appropriated for other purposes, under existing laws.

Judge Cooley, in his *Constitutional Limitations* (4th Ed. 93), says:

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the

business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.

It should be distinctly understood, however, that the practice of accepting and approving applications by the State in advance of the official determination as to the number of townships included, within the reservation, is a favor accorded to the State by the Department and not a matter of right, and that where any good reason exists for adopting a contrary course the Department may refuse to receive such application until after it has officially determined the number of townships included within the reservation.

The pending applications by the State of California to select indemnity for unsurveyed school sections included within the timber reservations created by executive orders of February 22, 1897, will be disposed of in accordance with the views herein expressed.

INDIAN LANDS—KLAMATH RIVER RESERVATION.

PETER EMETSBERG ET AL.

A homestead settler on lands within the Klamath River Indian reservation prior to the act of June 17, 1892, opening to entry said lands, may be allowed the right of purchase provided for in said act, in the absence of any intervening adverse claim, though his application for such privilege is not filed within the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, July 15,
(W. V. D.) 1897. (C. W. P.)

The land involved herein is the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 12, and E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 13, T. 13 N., R. 1 E., Humboldt land district, California.

The claimant, Andrew Jackson, made settlement on the land in September, 1888, made improvements thereon to the value of \$500, and was residing thereon at the time he applied to make entry, June 27, 1895. Original entry, No. 29, was made July 5, 1895; commuted cash entry, No. 27, July 23, 1895.

The tracts in question are part of Klamath River Indian reservation, in California, which are subject to disposal under the act of June 17, 1892 (27 Stat., 62), which provides:

That any person entitled to the benefits of the homestead laws of the United States who has in good faith, prior to the passage of this act, made actual settlement upon any lands within said reservation not allotted under the foregoing proviso and not reserved for the permanent use and occupation of any village or settlement of Indians, with the intent to enter the same under the homestead law shall have the preferred right, at the expiration of said period of one year to enter and acquire

title to the land so settled upon, not exceeding one hundred and sixty acres, upon the payment therefor of one dollar and twenty-five cents an acre, and such settler shall have three months after public notice given that such lands are subject to entry within which to file in the proper land office his application therefor.

Notice was given that the lands were open to entry on May 31, 1894, and as Jackson did not file his application within three months from that date, your office decided that he was not entitled to the right to elect whether he would pay cash for the land or make homestead entry, and therefore held his cash entry No. 27 for cancellation.

From this action Peter Emetsberg, Lymon Alexander, and Thomas F. McNamara, transferees of the said Andrew Jackson, have appealed.

By the act referred to the preferred right to purchase lands within said reservation is conferred upon actual settlers with intent to enter the same under the homestead law, and they are given three months after notice is given that the lands are subject to entry within which to file their claims and exercise their preferred right of purchase under the act. During that period the lands are subject to such preferred right of purchase, as against all other claimants. But as between the government and the settler, in a case like this, where there is no intervening adverse claim to the land, I see no good reason why the settler may not be allowed to purchase after the expiration of said three months.

You will therefore allow Jackson to purchase the land applied for in accordance with the provisions of the act.

Your office decision is reversed.

HOMESTEAD CONTEST—FAILURE TO ESTABLISH RESIDENCE.

MASON *v.* WILSON.

Acts in compliance with law performed by an entryman after the initiation of a contest, and prior to the service of notice thereof, can not be accepted as curing a prior default on the part of the entryman, if said acts were induced by knowledge of the impending contest.

The poverty of an entryman may excuse his absence from the land after the establishment of residence, but does not constitute a sufficient excuse for failure to establish residence within the prescribed period, where such default is charged by an intervening contestant.

Secretary Bliss to the Commissioner of the General Land Office, July 17,
(W. V. D.) 1897. (C. J. W.)

Andrew L. Wilson made homestead entry No. 20560, for the SE. $\frac{1}{4}$, Sec. 6, T. 141 N., R. 80 W., Fargo, North Dakota, on May 18, 1893. On the 21st of November, 1894, Hulbert Mason filed affidavit of contest against said entry, in which it is alleged that defendant has abandoned the land for more than six months since making the entry, and next prior to the date of said affidavit, and that as a matter of fact he had never resided upon the land since his entry, and had never had a building on the same fit for habitation, or that was used for a

dwelling, and that said tract was not settled upon and cultivated as required by law. A hearing was asked that contestant might prove his allegations. Notice issued directing the parties to appear at the office of Hiram O. Stert, clerk of the district court of Barnes county, and submit their testimony on January 9, 1895, and that the same be reported to the register and receiver on January 16, 1895. The hearing was had and the evidence reported in accordance with said order, when the final hearing occurred before the local officers on January 16, 1895.

On July 22, 1895, said officers rendered a decision, finding the charges sustained and recommending the cancellation of the entry.

The defendant appealed, and on February 26, 1896, your office affirmed the decision of the local officers, and held the entry for cancellation.

The case comes before the Department on further appeal of the defendant from your office decision. The grounds of the appeal are as follows:

1st. That said decision is contrary to the law and the evidence, in that the evidence shows that the defendant was actually residing upon and cultivating the land, previously and at the time of service of notice of contest.

2d. The testimony shows that the defendant resided upon and cultivated the tract to the best of his means and ability.

3d. The testimony shows that defendant intended to fully comply with the homestead laws, but could not strictly comply with them because of his poverty.

The evidence discloses the fact that defendant had no habitable building on the land, and had never resided on it prior to the filing of contest, about eighteen months after the date of his entry. He had in fact cultivated five acres of the land for a year and had prepared ten for cultivation and cannot be held to be in default in reference to cultivation, considering his financial condition; but his failure to establish residence and reside upon the land is another matter. (*Davis v. Kaminsky*, 10 L. D., 346.) Inasmuch as he finally took up his residence upon the land, that is the turning point in the case. If the case was proceeding between the entryman and the government alone, it might be held that he had cured his default, but the rule is not the same when the rights of a contestant have intervened. In such case the default may be cured at any time before the initiation of a contest, and the date at which the rights of a contestant may be said generally to be initiated is from the date of the filing of the affidavit of contest, but the date of notice to the entryman of the commencement of such proceedings is the date from which the entryman's rights will be affected. In this case the entryman commenced to reside upon the land between the date of the filing of the contest and its formal service upon him. On this subject he himself testifies that he slept on the land the first time the 25th or 26th of November, 1894, and that the date of the written notice is about 21st of November, though not served on that day. He is asked if he did not have information that the claim was contested before the written notice was served upon him, to which he answers,

"I had heard something about it." He is asked again, "Is it a fact or is it not that after you got information that your claim was contested you for the first time took some bedding over to the shanty?" to which he answers, "that is the first time." Again he is asked, "It is a fact is it not that you never cooked or caused to be cooked a meal of victuals on the tract in question prior to the month of December, 1894?" to which he answers, "Yes sir."

The defendant was a single man and resided with his mother on a farm one and three-quarters miles from the claim in question and had done so for about eighteen months after his entry, and it is apparent that it was the information he received that his claim was contested which caused him to carry bedding and commence to sleep on his claim. In cases where entrymen have failed to establish residence within the time required by law after making entry, and are called upon to show cause why the entry should not be cancelled, and show, for cause, that they have cured the default by establishing residence before the hearing, the case being entirely between the government and the entryman, the default may be excused, if good faith is otherwise manifested, but it is not a legal right upon which the defendant may rely. Where the showing is the result of a contest initiated with a view to entry by the contestant, the default cannot be excused, if the acts of late compliance with law relied upon were caused by and are directly traceable to the contest, and are not voluntary acts of good faith upon the part of the entryman. The poverty of the entryman in this case is the chief ground relied upon to excuse his failure to establish residence within the prescribed time. The showing made would have force as an excuse for absence after the establishment of residence, but is not a sufficient excuse for failure to establish residence.

In the case of *Redding v. Riley* (9 L. D., 523), it was held—

that the failure of a homesteader to establish residence within six months from entry warrants cancellation, if such default is not cured prior to the initiation of contest.

2. That official duty cannot be accepted as an excuse for absence from the land, if residence in good faith was not acquired prior thereto.

The same legal necessity suggests the holding that poverty is not an excuse for absence until after residence is established, as held by your office. It is to be said to the credit of the defendant that he has manifested no bad faith, except in the matter of residence, and for his default in this respect he offers such excuse as might be accepted but for the intervening rights of the contestant which are legal and must be recognized.

Your office decision is affirmed, and the defendant's entry held for cancellation, subject to the contestant's right of entry.

RAILROAD LANDS—NOTICE OF RESTORATION—INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. Co.

The Northern Pacific company should be allowed to specify new bases for selections made on account of lands within the limits formerly recognized east of the terminal established at Duluth.

Secretary Bliss to the Commissioner of the General Land Office, July 17,
(W. V. D.) 1897. (F. W. C.)

I am in receipt of your office letter "F", of the 13th instant, transmitting for my approval directions to the local officers at Duluth, Minnesota, and Ashland, Wisconsin, to publish for thirty days in some newspaper of general circulation in the vicinity of the lands affected, a notice of departmental decision of August 27, 1896 (23 L. D., 204), in the case of the Northern Pacific Railroad Company, to the effect that all lands lying east of the terminus of said company's grant established at Duluth, and theretofore withdrawn, have been restored to the public domain and are subject to entry.

In this connection I note that in the decision of August 27, 1896, *supra*, no directions were given permitting the company to specify new bases for selections theretofore made on account of lands within the limits formerly recognized east of the terminal established at Duluth.

In departmental decision of November 13, 1895 (21 L. D., 412), which directed the temporary establishment of a terminal line at Superior City, Wisconsin, it was said:—

I further learn upon inquiry at your office that the lands east of Superior City were made the basis for the selection of a large quantity of lands from the indemnity belt of the company's grant in North Dakota. These selections having been made some while ago, many, if not all, of the lands selected have, perhaps, been sold by the company.

The previous action of this Department giving color to the company's right to a grant east of Superior City, and the application of the rule that the indemnity lands should be selected nearest to those lost, were the probable causes for the specification of these lands as a basis for the selections referred to.

In view thereof, I have to direct that the company be allowed sixty days from notice of this decision within which to specify a new basis for any of its indemnity selections avoided by this decision, and that during that period no contests against such selections, where the charge is that the basis was made of lands east of Superior City, or application to enter under the settlement laws, will be received.

This same rule should be adopted and I have to direct that the company be notified accordingly.

The directions to the local officers at Duluth, Minnesota, and Ashland, Wisconsin, are returned herewith approved.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 17, 1897.

REGISTER AND RECEIVER,
Duluth, Minn.

SIRS: On August 27, 1896 (23 L. D., 204) the Secretary of the Interior rendered a decision wherein he held that the initial point on Lake Superior or the eastern terminus of the grant to the Northern Pacific Railroad Company was at Duluth, Minnesota, and on December 24, 1896 he approved a diagram prepared by this office showing the eastern terminal of the grant.

On January 23, 1897 a copy of so much of said diagram as related to, or affected lands within, your district, was transmitted to you for the use and guidance of your office.

The decision of the Secretary aforesaid had the effect of restoring to the public domain all lands lying east of said terminal which had theretofore been withdrawn on account of the grant to said railroad company. Therefore, to the end that all persons interested may have opportunity to present any claims they may have to any of these lands, you will cause to be published for the period of thirty days in some newspaper of general circulation in their vicinity, a notice referring to said Secretary's decision which in effect declared that all lands previously withdrawn on account of the grant to the Northern Pacific Railroad Company and lying east of the terminal established at Duluth, are restored to the public domain and are subject to disposal at your office. It should be specifically stated in said notice that all persons claiming rights, under the provisions of the act of March 3, 1887 (24 Stat. 556), through purchase from the railroad company, should come forward and assert their claims at the earliest possible date in order to avoid conflicts which will necessarily arise through entries made under the general land laws, your office having no information as to the tracts likely to be claimed under said act.

The receiver, as disbursing officer, will pay the cost of the publication and forward a copy of the notice, with proof of publication as his voucher for the disbursement.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved,
C. N. BLISS,
Secretary of the Interior.

Note: Similar directions were given on the same date as above to the local office at Ashland, Wisconsin.

FOREST RESERVATION—YOSEMITE NATIONAL PARK—MINING CLAIM.

OPINION.

The act of October 1, 1890, directing the establishment of the forest reservation, known as the Yosemite National Park, did not affect or impair rights acquired under a mineral location duly made prior to the passage of said act; and the owner of such a claim should be permitted the necessary use, for purposes of ingress and egress, of lands reserved by said act, subject to such reasonable rules as may be made by the Secretary of the Interior.

The right of a miner to cut timber within said reservation is restricted to the land embraced within his mining claim.

Assistant Attorney General Van Devanter to the Secretary of the Interior,
July 20, 1897. (E. B., Jr.)

I have the honor to acknowledge the receipt, by reference of the 7th instant from Mr. Acting Secretary Ryan, of a letter from the acting

superintendent of the Yosemite National Park and of the papers and correspondence mentioned therein. This reference is "for an opinion with regard to the legal status of the mining claim in question under the act of October 1, 1890 (26 Stat., 650), and for proper replies to the inquiries No. 1, 2, and 3 propounded by the acting superintendent" aforesaid. These inquiries, or points upon which the acting superintendent requests instructions are:

1. As to the extent of authority vested in the acting superintendent in regulating the working of valid claims.
2. In regard to determining when claims are to be considered as lapsed or abandoned, as by reason of failure to perform necessary assessment work, or to record the same.
3. As to regulations of miners' rights outside of their claim limits, as in the construction of trails, roads, ditches, cutting timber for mining purposes, etc., etc.

It would appear from the papers submitted that on August 6, 1879, there was duly located, by August Cordes and Wm. A. Hoyt, on the western slope of Mt. Gibbs, in township 1 south, range 25 E., M. D. M., in Tioga Mining District, California, a lode mining claim known as the New Brunswick Gold and Silver Mining Claim, and that this claim has ever since been held and worked in compliance with the mining laws. Said Cordes alleges that under and by virtue of said location and compliance since with the mining laws, he is the present owner of this claim, in connection with which, and as being absolutely necessary in order to pack the ore out to a mill and concentrator and to market it, he has built a trail along Bloody Canon, within said park, but outside of his claim, at an expense of \$150. He claims the possessory title to this mining claim and the right to use and maintain the said trail for the purpose above stated, notwithstanding the act of October 1, 1890, *supra*.

By the first section of said act the township in which said claim is located, and certain other lands as therein described, now known as the "Yosemite National Park," in the State of California, were "reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands"; and it was therein declared that—

all persons who shall locate or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: *Provided, however*, That nothing in this act shall be construed as in anywise affecting . . . any *bona fide* entry of land made within the limits above described under any law of the United States prior to the approval of this act.

And in the second section of said act it was further declared—

The said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition.

In pursuance of the duty thus enjoined, Mr. Secretary Smith, on June 2670—VOL 25—4

1, 1896, made and promulgated rules and regulations of the Yosemite National Park, Rule 4 of which reads:

No person shall cut, break, remove, impair, or interfere with any trees, shrubs, plants, timber, minerals, mineral deposits, curiosities, wonders, or other objects of interest in the park; and all of the same shall be retained in their natural condition.

In discussing the rights of locators of lode claims, or parties holding under locations of such claims, the supreme court, in the case of *Noyes v. Mantle* (127 U. S., pp. 351 and 353), said:

Section 2322 of the Revised Statutes, re-enacting provisions of the act of Congress of May 10, 1872 (17 Stat., 91), declares that the locators of mining locations previously made or which should thereafter be made, on any mineral vein, lode, or ledge on the public domain, their heirs and assigns, where no adverse claim existed on the 10th of May, 1872, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, so long as they comply with the laws of the United States, and with State, territorial, and local regulations, not in conflict with those laws governing their possessory title. There is no pretence in this case that the original locators did not comply with all the requirements of the law in making the location of the Pay Streak lode mining claim, or that the claim was ever abandoned or forfeited. They were the discoverers of the claim. They marked its boundaries by stakes, so that they could be readily traced. They posted the required notice, which was duly recorded in compliance with the regulations of the district. They had thus done all that was necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of the ground. The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale.

* * * As said in *Belk v. Meagher*, 104 U. S., 279, 283: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent." It is not, therefore, subject to the disposal of the government.

In *Belk v. Meagher*, *supra*, upon the same question Mr. Chief Justice Waite, speaking for the court concerning the status of certain mineral land under locations thereof made prior to December 19, 1876, on which latter date *Belk* made the relocation under which he claimed, further said:

On the 19th of December the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. As the United States could not at the time give *Belk* the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purposes of a valid location of a claim under the act of Congress. A location to be effectual must be good at the time it is made. When perfected it has the effect of a grant by the United States of the right of present and exclusive possession.

As has been seen, "any *bona fide* entry of lands" within said park, made prior to the act of October 1, 1890, was specifically excepted from

the operation thereof. No mention is made therein of any existing mining claim for which entry had not been made. No specific exception was really necessary to reserve any land duly entered from the operation of the act since such land, being then already appropriated, was not subject to other disposition by Congress; and it is equally clear from the language of the supreme court in the cases cited above, that no exception was needed to reserve any mining claim duly located and held in compliance with the mining laws at the date of said act. The right to the possession and use of such a claim and ultimately to perfect title to the same in accordance with the mining laws was a property right and was just as much protected by the constitutional guaranty that private property shall not be taken for public use without just compensation as was "any *bona fide* entry" mentioned in said proviso. So long as the owner of the New Brunswick claim, or any one regularly holding under him, complies with the mining laws, the ownership of the possessory title thereto and the right to operate the mine will not be in any way impaired by the said act or by said Rule 4, to which Mr. Cordes calls special attention.

The necessary use of the park lands for purpose of ingress and egress Mr. Cordes should, in my opinion, be permitted to enjoy, subject to such reasonable rules as the Secretary of the Interior may make under the authority given him in said act (See opinion of Mr. Assistant Attorney General Shields, dated January 5, 1892, in case of the Hite Lode and Mill Site). This will apply, of course, to the use of the trail already constructed by him along Bloody Canon. The foregoing covers generally the case presented by Mr. Cordes and the inquiries of the acting superintendent of the park.

Answering each inquiry specifically, I advise you that, as to the first there does not appear to be any authority vested in such superintendent to regulate in any way the working of mining claims within said park; as to the second, that he has no authority to determine when such claims "are to be considered as lapsed or abandoned"; and as to the third, that the rights of Mr. Cordes as to the trail constructed by him have been already indicated. He is not claiming the right to construct any road or ditch, or to cut timber outside of his claim, and there are, therefore, no facts before me upon which to base an opinion, and no call for an opinion as to such right in his case.

I am not aware of any law by virtue of which any miner has now, or has had at any time since the passage of said act, the right to cut timber within said park outside the limits of his own claim. In *United States v. Benjamin* (21 Fed. Rep., 285) it was held by Judge Sawyer, construing the act of June 3, 1878 (20 Stat., 88), and the other act of same date (20 Stat., 89), that the second act only applied to public lands in California, and that in that State a miner had no right to cut timber outside his own claim, upon public lands. Much more, then, since the act of October 1, 1890, reserving the lands in said park, is a

miner on a claim therein, although such claim was duly located and subsisting at the date of the act, restricted from cutting timber on such lands outside his own claim. I do not think such miner has a right to construct any road or ditch therein unless the same is absolutely necessary to the development of his claim, and then authority for such construction should be first obtained from the Secretary, and the construction be done under his supervision.

Relative to the inquiry numbered 2, I would respectfully suggest that the superintendent of said park be instructed that in case any claim which was duly located and subsisting at the date of said act shall be made to appear to him as having been abandoned, that he report the facts in the case to the Secretary for his consideration and action.

Approved, July 20, 1897,

C. N. BLISS,

Secretary.

PRACTICE—EVIDENCE—VARIANCE—OBJECTION.

SCHMID *v.* WATT'S HEIRS.

An objection to testimony on the ground of variance between the charge as laid in the affidavit of contest, and that set forth in the notice of the hearing, comes too late when raised for the first time on appeal.

Secretary Bliss to the Commissioner of the General Land Office, July 20,
(W. V. D.) 1897. (F. W. C.)

An appeal has been filed by Mary E. Wiley, guardian of George C. and Maria E. Watt, minor children of Thomas K. Watt, deceased, from your office decision of February 13, 1896, holding for cancellation her homestead entry covering the SW. $\frac{1}{4}$ of Sec. 26, T. 20 N., R. 9 W., Alva land district, Oklahoma.

On September 27, 1893, Mary E. Wiley, guardian of George C. and Maria E. Watt, minor children of Thomas K. Watt, a deceased soldier, made in her own name, as such guardian, homestead declaratory statement No. 47, for the land above described.

On the following day Mary E. Schmid made homestead entry for the same land.

On March 22, 1894, Mary E. Wiley, as guardian of the above named children, made homestead entry of this land. Thereafter Mary E. Schmid was called upon to show cause why her entry should not be canceled for conflict with the entry made by Mary E. Wiley, as guardian. In answer to the rule Mary E. Schmid filed her corroborated affidavit in which she alleged settlement on the land prior to the date of the filing by Mary E. Wiley, as guardian. Further, that "said Mary E. Wiley has not made any improvements on said land as required by law." Hearing was ordered upon said affidavit by your office letter

"C" of August 11, 1894, to determine the respective rights of the parties in the premises, which hearing was duly held November 10, 1894.

Upon the testimony adduced the local officers on June 18, 1895, recommended the cancellation of the entry by Mary E. Wiley, as guardian, and that the entry by Mary E. Schmid be permitted to remain intact.

Motion was filed for review of said decision, which was denied by the local officers on August 13, 1895, and two days later an appeal was filed, said appeal being considered in your office decision of February 13, 1896, in which you sustained the decision of the local officers and held for cancellation the homestead entry by Mary E. Wiley, as guardian, from which appeal has been taken to this Department.

The tract in controversy is within the Cherokee Outlet something over half a mile north of the south line thereof, and both parties allege settlement on the day of opening under the President's proclamation, each alleging settlement thereon within two or three minutes after twelve o'clock, noon, September 16, 1893.

The testimony is conflicting as to which of the parties performed the first act of settlement, but the preponderance of testimony sustains the claim that Mary E. Schmid was the prior settler. She made the race together with her father and other relatives, her father taking the adjoining tract. She does not appear to have taken up an actual residence upon the land until about March 11, at which time her house had been completed about three days. This was nearly six months from the date of her entry, and no excuse is offered for her failure to establish an earlier residence.

The minor children of Thomas K. Watt, deceased, are not, however, in a position to take advantage of whatever might be the result of the laches of Mrs. Schmid in failing to establish her residence for such a period from the date of her settlement, for the reason that it is clearly shown that they had not complied with the law as to improvement and cultivation of the tract, and it is not shown that such failure resulted from causes beyond their control.

As before stated, the affidavit upon which this hearing was ordered, in addition to the allegations of prior settlement charges that "Mary E. Wiley, has not made any improvement on said land as required by law." The notice of the hearing ordered upon said affidavit did not include the charge above quoted. At the time of the hearing, however, no objection was made to the variance between the affidavit made the basis for the hearing and the charge contained in the notice. While local officers acquire jurisdiction over the parties by the notice, yet the basis for the hearing is the charge contained in the complaint or contest affidavit.

Had objection been made to the variance, new notice would have been necessary, unless the defect was waived.

A general appearance was entered however, and testimony was offered on behalf of the guardian, tending to explain or excuse her failure to

cultivate the land. Further, while a general objection was made to the introduction of some of the testimony tending to show her failure to cultivate and improve the tract, yet much of the testimony of this character was taken without objection.

I am therefore of opinion that the objection made in the appeal to the consideration of the testimony on said charge comes too late.

The record clearly sustains the finding that the guardian failed to cultivate and improve the tract as required by law.

The appeal also urges that Mary E. Schmid is not qualified to make a homestead entry, but the record does not sustain this claim.

After a careful consideration of the matter, I affirm your office decision and direct that the entry made by Mary E. Wiley, as guardian, be canceled.

PATENT—JURISDICTION—FILING.

MARTIN *v.* NORTHERN PACIFIC R. R. CO.

The Department has no jurisdiction over patented lands, not even to direct that a filing therefor be received and held to await the result of proceedings already instituted to vacate the patent.

Secretary Bliss to the Commissioner of the General Land Office, July 21,
(W. V. D.) 1897. (G. C. R.)

Henry C. Martin has appealed from your office decision of May 16, 1896, which affirms the action of the register and receiver rejecting his coal declaratory statement for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 24 N., R. 5 E., Seattle, Washington. Said filing was rejected because the said tracts were patented to the Northern Pacific Railroad Company on December 13, 1894.

It appears that on June 12, 1868, one Charles Holland filed his pre-emption declaratory statement for the same land, and that this filing was of record at the date (March 26, 1884,) when said company filed its map of definite location. For this reason it would appear that the land was erroneously patented to the company, and proceedings have already been commenced looking to the recovery of the title to said tracts, with others similarly situated, to the United States.

The lands having been patented, the Department, under their present status, has no jurisdiction over them, not even to direct that the filing "be received and held to await action in the matter of the cancellation of the patent," as insisted upon.

The decision appealed from is affirmed.

OKLAHOMA LANDS—CHEROKEE OUTLET—PRESIDENT'S PROCLAMATION.

BRADY ET AL. *v.* WILLIAMS (ON REVIEW).

The period of inhibition against entering upon lands in the Cherokee Outlet dates from the proclamation of the President announcing the time when said lands would be opened to settlement.

The regulations with respect to opening the Cherokee Outlet, made under direction of the President and incorporated in his proclamation, provided for an entering strip one hundred feet in width around and immediately within the outer boundaries of the entire tract of country to be opened, and can not be abrogated or modified by the act of the Secretary of the Interior alone.

The prohibitory provisions of the statute opening to settlement the lands known as the "Cherokee Outlet," and the President's proclamation thereunder, did not apply to the whole of said Outlet, but only to such portion thereof as should be declared open to settlement under said proclamation, and hence are not applicable to Indian reservations within said Outlet excluded from settlement, but adjacent to the lands opened under said proclamation.

The fact that a settler on lands in said Outlet may have trespassed upon adjacent Indian reservations, in reaching said lands, will not in itself disqualify him from making a homestead.

While the doctrine of *stare decisis* is recognized and followed by the Department, it will not be held applicable to a decision that is violative of the law, and operates to take away a statutory right.

Secretary Bliss to the Commissioner of the General Land Office, July 24,
(W. V. D.) 1897. (P. J. C.)

Motions for review of departmental decision of December 23, 1896 (23 L. D., 533), have been separately filed by counsel for John H. McDonald and John M. Dahl. It was determined by said decision that Michael Brady was the prior settler on the NW $\frac{1}{4}$, Sec. 30, Tp. 26 N., R. 1 E., Perry, Oklahoma, land district. The principal feature of the case, however, is that the case of *Cagle v. Mendenhall* (20 L. D., 447,) was overruled, and the motions for review, as well as the argument of counsel, both oral and printed, are largely addressed to this one question.

There is one other suggestion of error that will be disposed of first, and that is, that Brady was disqualified, by reason of entering the territory about August 3, between the date of the passage of the act opening the Cherokee Outlet for settlement, March 3, 1893, and the date of the issuance of the President's proclamation, August 19, following.

This question has been decided by the Department in *Townsite v. Morgan et al.*, (21 L. D., 496) and *Bowles v. Fraizer* (22 L. D., 310), wherein it was said that

the period of inhibition against entering upon lands in the Cherokee Outlet dates from the proclamation of the President announcing the time when said lands shall be opened to settlement.

The distinction between the several acts of Congress in opening different parts of what now constitutes Oklahoma Territory is clearly

pointed out in the first case, and it is not deemed necessary to further discuss the subject.

The decision in the case at bar turned upon the construction to be placed upon the statute opening the Cherokee Outlet to settlement and the President's proclamation in furtherance thereof.

In the Eagle case it was decided that those entering the Outlet from the east side were disqualified from taking any of the lands, because the Department had forbidden persons from making the run from that side. In the case at bar, this decision was overruled, on the grounds: First, that there was no record in this Department of any official notice forbidding people from starting from the east side; second, that the "one hundred foot strip" was created on the east side as upon all others by the proclamation; third, that the Secretary of the Interior could not by the action taken by him abrogate or modify the President's proclamation; and, fourth, that the fact that a person entered from the Indian reservations would not prevent him from successfully acquiring a homestead claim to lands in the territory so opened to settlement.

The entire subject in relation to the act of Congress and the President's proclamation was discussed at length in the decision under review, and it would seem as if there were little more to be said in connection therewith.

The act of Congress was specific in its requirement that the proclamation "be issued at least twenty days before the time fixed for the opening," and the manner of occupying or entering upon any of the lands was to be "prescribed by the proclamation of the President opening the same to settlement." The Secretary of the Interior "under the direction of the President," was authorized to prescribe rules and regulations, not inconsistent with the act, for the occupation and settlement of such lands, which rules and regulations were "to be incorporated in the proclamation."

The authority of the President to amend or modify his original proclamation by a succeeding one, the necessity for the issuance of such amendatory proclamation at least twenty days before the time for the opening, and the authority of the Secretary, alone, to make additional regulations in furtherance of, but not inconsistent with, the regulations prescribed under the direction of the President and incorporated in the proclamation, are all matters the consideration of which is not necessary to a decision of this case.

If the regulations prescribed under the direction of the President and incorporated in his proclamation issued twenty days before the opening, placed an entering strip of one hundred feet in width on the east side of the country to be opened to settlement and authorized entry thereupon in advance of the opening, by those intending to join in the run then to be made, it is certain that these regulations could not be abrogated or modified by the act of the Secretary alone. It is

incompatible with every rule of construction and with every true conception of authority, to hold that any mere communications of the Secretary would have the effect of revoking or altering the President's proclamation which was issued under the direct authority of Congress and had the force and effect of a law.

It is insisted that Brady's starting point was within the Cherokee Outlet and that because of this he was disqualified. He made his start from the east side of the Arkansas River, which forms a part of the eastern boundary of the land opened for settlement. If the strip one hundred feet in width, established by the President's proclamation, extended along and within the eastern boundary of *the lands opened to settlement* then Brady was outside of such strip and had to cross it in making his run at the opening.

The 10th section of the statute (27 Stat., 612-640), provides for the acquisition from the Cherokee Nation of Indians of "all right, title, interest and claims which the said Nation of Indians may have in and to" what is commonly known and called the Cherokee Outlet," being—

Bounded on the west by the one hundredth degree of west longitude; on the north by the State of Kansas; on the east by the ninety-sixth degree of west longitude and on the south by the Creek Nation, the Territory of Oklahoma, and the Cheyenne and Arapahoe reservations, created or defined by executive order dated August tenth, eighteen hundred and sixty-nine,

and authorized—

The President of the United States by a proclamation to open to settlement *any or all* of the lands not allotted or reserved,

and directed that—

No person shall be permitted to occupy or enter upon any of the lands herein referred to, except in the manner prescribed by the proclamation of the President opening the same to settlement; and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands.

The President's proclamation (17 L. D., 230-236) declared and made known—

That all the lands acquired from the Cherokee Nation of Indians be opened to settlement saving and excepting lands described and identified as follows, to wit: The lands set apart for the Osage and Kansas Indians being a tract of country bounded on the north by the State of Kansas, on the east by the ninety-sixth degree of west longitude, on the south and west by the Creek country and the main channel of the Arkansas River; the lands set apart for the confederated Ojibwa and Missouri tribe of Indians and the lands set apart for the Ponca tribe of Indians.

And directed that (page 239)—

Said lands so to be opened, as herein proclaimed, shall be entered upon and occupied only in the manner and under the provisions following to wit: a strip of land one hundred feet in width around and immediately within the outer boundaries of the entire tract of the country to be opened to settlement under this proclamation is hereby temporarily set apart for the following purposes and uses, namely, viz: said strip the inner boundary of which shall be one hundred feet from the exterior bound-

ary of the country known as the Cherokee Outlet shall be opened to occupancy in advance of the day and hour named for the opening of said country, by persons expecting and intending to make settlement pursuant to this proclamation. Such occupancy shall not be regarded as trespass or in violation of this proclamation or of the law under which it is made, nor shall any settlement rights be gained thereby.

The Osage, Ponca and Confederated Otoe and Missouri reservations were within the country "commonly known and called the Cherokee Outlet" acquired by the statute from the Cherokee Nation of Indians, but they were not within the country opened to settlement by the President's proclamation.

The statute did not direct that the entire country acquired from the Cherokees should be opened to settlement, but vested in the President the authority "to open to settlement *any or all* of the lands not allotted or reserved." In the exercise of this authority the President expressly excluded from the country so opened, each of the reservations aforesaid. They were neither singly nor collectively surrounded or bounded by lands opened to settlement. They constituted and embraced a compact portion of the so called Cherokee Outlet, situated in the extreme north-east portion thereof, so that their northern boundary was the northern boundary of the Outlet, their eastern boundary its eastern boundary, and their western boundary the eastern boundary, or eastern line, of the lands opened to settlement. Neither of these reservations was so situated that to obtain entrance thereupon required an entry or crossing of lands opened to settlement. While these reservations were within the so called Cherokee Outlet they were not within, or surrounded by, the lands opened to settlement.

While this is apparently admitted, it is nevertheless asserted by counsel that the prohibitory provisions of the statute (page 643) extend to the entire so called Cherokee Outlet and are not limited to the lands opened to settlement. This contention is based upon that provision of the statute hereinbefore quoted and which reads:

No person shall be permitted to occupy or enter upon any of the lands herein referred to except in the manner prescribed by the proclamation of the President opening the same to settlement, and any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands.

The entire so called Cherokee Outlet being theretofore "referred to" in the statute it is claimed that this prohibition against occupancy and entry extends to every part thereof. If the Cherokee Outlet had been the only lands referred to in the statute, this contention would have been better supported, but the statute makes different references to different lands. In one place it refers to the lands acquired from the Cherokees and in another to the lands which may be opened to settlement by the President's proclamation. The provision in question is inserted in the statute in direct connection with other provisions relating to the lands to be opened to settlement, and is in its location quite remote from the provisions relating to the acquisition of the entire Cherokee Outlet.

The phrase "lands herein referred to" if otherwise doubtful in meaning, is fully explained and relieved of all doubt by the other language used in the same sentence. The prohibition against occupancy and entry of the "lands herein referred to," is not absolute but is a qualified one, only declaring against occupancy and entry when not according to the "manner prescribed by the proclamation of the President," thus showing that the lands meant are not those wholly excluded from settlement, as is the case with the Indian reservations, but are such as can be occupied and entered upon under the proclamation. The sentence also speaks of the proclamation as "opening the *same* to settlement." The word "same" refers back to the phrase "lands herein referred to" and embraces whatever is embraced by that phrase, nothing more and nothing less. Since whatever is included by the word "same" is opened to settlement, it follows that its equivalent is only that which is opened to settlement. The provision then proceeds by declaring that "any person otherwise occupying or entering upon any of said lands shall forfeit all right to acquire any of said lands." The word "otherwise" here means in some manner other than that prescribed in the proclamation, thus indicating that reference is made to only such lands as can be occupied and entered according to the proclamation. The penalty for otherwise occupying or entering upon any of them is declared to be a forfeiture of all right to acquire any of them. The words "any of said lands" are twice used and evidently with the same meaning each time. Since one had no right to acquire any land except those opened to settlement, it follows that these words refer to such lands.

The prohibition of the statute is clearly confined to the occupying and entering of lands which were opened to settlement and does not refer to, or attempt to regulate, the occupancy or entry of any other lands such as are embraced in the Indian reservations.

It is true that the President's proclamation while clearly showing that only a portion of the so called Cherokee Outlet was intended thereby to be opened to settlement, nevertheless seems to inadvertently refer in one place to the "country known as the Cherokee Outlet," as synonymous with "the entire tract of country to be opened to settlement under this proclamation." Reading the proclamation altogether and giving reasonable effect to all of its provisions it is clear that the regulations with respect to occupancy and entry extend only to the lands thereby opened to settlement and that the one-hundred-foot strip, to use the clear and unmistakable language of the proclamation was around and immediately within the outer boundaries of the entire tract of country to be opened to settlement under this proclamation.

Considering the purpose of the proclamation, considering that the strip was expressly located around and immediately within the outer boundaries of some "entire tract", and considering that it is not probable that the President would have located such strip upon an Indian

reservation and along the outer boundary thereof, thereby devoting a portion of the Indian reservation to a purpose foreign to its creation, it seems clear that the express language of the proclamation placing such strip "around and within the outer boundaries of the entire tract of country to be opened to settlement" is not overcome or modified by the use of any such general term as "the country known as the Cherokee Outlet," in the succeeding clause. This last phrase may well be held to relate to that portion of the Outlet opened to settlement and this, unquestionably, was the intention of the proclamation.

It is also urged with much earnestness, that the doctrine of *stare decisis* should be applied to the Cagle-Mendenhall case.

While it is the policy of the Interior Department to recognize and adhere to this doctrine, yet where a construction is erroneously placed upon the law or the rules and regulations which deprives persons of the exercise of their homestead rights, it will not hesitate to overrule it. This rule is not ironclad,

and the future and permanent good to the public is to be considered, rather than any particular case or interest. "The benefit to the public in the future is of greater moment than any incorrect decision in the past." "Where vital and important public and private rights are concerned, and the decisions regarding them are to have a direct and permanent influence in all future time, it becomes the duty, as well as the right, of the court to consider them carefully and to allow no previous error to continue if it can be corrected. (23 Am. and Eng. Encyclopedia of Law, 36).

The law of the land gives Brady the right to make a homestead entry on the public domain, and this valuable right should not be taken away in the absence of some authority of law therefor. The decision in the Cagle case, if followed, will have that identical effect. It decided that one making the run from the eastern boundary of the territory opened to settlement, was disqualified from entering land in that territory. In my judgment, this was violative of the statute and proclamation and was unwarranted under the law. Reasoned from any standpoint, I am unable to see how the doctrine of *stare decisis* should be applied to the Cagle case.

It is argued that those entering from that side were trespassers by having reached the strip through the Indian reservations, but the fact that one was a trespasser in the Indian reservations would not, of itself, disqualify him from making a homestead entry. No such result is declared in the statute in question and none such is found in any law or treaty.

The motions are therefore overruled.

GUILLORY *v.* BULLER.

Motion for review of departmental decision of February 27, 1897, 24 L. D., 209, overruled by Secretary Bliss, July 27, 1897.

APPLICATION TO ENTER—PENDING CONTEST.

CIRCULAR.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,

Washington, D. C., March 25, 1897.

Registers and Receivers, U. S. Land Office.

GENTLEMEN: For your guidance in the matter of the disposition of applications presented for lands covered by entries under contest, your attention is directed to the course of procedure outlined in departmental decision of January 30, 1897 (24 L. D., 81), being as follows:

First: *For the disposition of applications presented before final judgment upon the contest:*

No application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined, until which time no other rights, inchoate or otherwise, can attach.

Second: *For the disposition of applications presented after final judgment, and during period accorded successful contestants:*

If, during the time accorded a successful contestant to make entry of the land involved, an application or applications to enter should be made by a stranger or strangers to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

BINGER HERMANN,
Commissioner.

Approved March 25, 1897.

C. N. BLISS,
Secretary.

RAILROAD GRANT—LANDS EXCEPTED—ACTUAL SETTLER.

PENNINGTON *v.* NEW ORLEANS PACIFIC RY. CO.

The evident intent of Section 2, act of February 8, 1887, was to protect in their possession only those who were actual settlers at the date of definite location, or other qualified persons to whom they might thereafter have assigned their possessory right.

Secretary Bliss to the Commissioner of the General Land Office, July 27, (W. V. D.) 1897. (F. W. C.)

John Pennington has appealed from the decision of your office dated March 12, 1896, in which was dismissed the proceedings arising upon

* Not reported in Vol. XXIV.

his application to enter under the second section of the act of February 8, 1887 (24 Stat., 391), the S. $\frac{1}{2}$ NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 7, T. 6 N., R. 1 E., New Orleans land district, Louisiana.

This tract was within the primary limits of the grant made by the act of Congress approved March 3, 1871 (16 Stat., 579), to the New Orleans, Baton Rouge and Vicksburg Railroad Company, which company assigned its rights under its grant to the New Orleans Pacific Railway Company and this assignment was, by the act of February 8, 1887, confirmed as to the portion of the grant opposite which the tract in question lies.

The line of road was definitely located opposite this tract November 17, 1882. It was listed by the company November 13, 1883, and patented March 3, 1888.

On November 20, 1894, Pennington tendered an application to enter this land and in support thereof alleged that the land had been continuously occupied since 1872; that he came into possession of the land in 1893, through purchase from Morgan Willingham, a prior occupant, and had since continued residing thereon.

Upon said allegations hearing was had and upon the testimony adduced the local officers decided in his favor, holding the tract to have been excepted from the grant to the New Orleans Pacific Railway Company and that Pennington should be permitted to make entry under the homestead law, as applied for.

From said decision the company failed to appeal, but upon reviewing the case under rule of practice No. 48, your office decision of March 12, 1896, held: First, that there was no affirmative testimony sufficient to show that the land was settled upon and occupied at the date of the definite location of the road; second,

Neither does it show that any of the alleged settlers on the land were possessed of the requisite qualifications, during the period of their alleged occupancy, to make entry under the settlement laws.

The company having failed to appeal from the action of the local officers, their decision became final as to the facts, and in their decision it is held:

Upon examination of the testimony submitted we find that Pennington has resided upon and cultivated the land involved during the last two years, but prior to that time said land has been continuously resided upon and cultivated by the assignors of said Pennington.

This would seem to be a finding of fact sustaining the allegations made by Pennington relative to continued occupancy of the land, as alleged, by those through whom he claims to have purchased, which antedated the filing of the company's map of definite location.

This would seem to satisfy the first objection raised in your office opinion to the favorable consideration of Pennington's application.

As to the qualifications of the occupants of this land prior to Pennington, the local officers make no finding of fact and as this, in my opinion, is material matter for consideration in determining the rights of parties under the act of 1887, it becomes necessary to review the

record in order to ascertain what showing was made upon the question as to the qualifications of said alleged settlers upon this tract.

The second section of the act of February 8, 1887, *supra*, provides:

That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession, or in possession of their heirs or assigns, shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

It will be noted that the language used is: "Occupied by actual settlers." This was evidently intended to embrace only those who had settled with an intention to make entry of the land at some future time under the provisions of the settlement laws of the United States, and only those qualified to assert a settlement claim to the lands so settled upon would be embraced within the protection of said section. It cannot be presumed that Congress meant to except from the grant all lands that might be in the occupancy of persons, without regard to their qualifications to make entry at the time, under the general land laws.

Its evident purpose was to protect in their possession, only those who were actual settlers at the date of definite location, or other qualified persons to whom they might thereafter have assigned their possessory right.

Notwithstanding the fact that this land has been patented to the company, it would seem to be the duty of the Department, under the said act, to determine, upon the facts presented, whether the applicant here is entitled to the protection of its remedial provisions.

The testimony relative to the nature of the claims of the prior occupants of this tract is very meager and unsatisfactory. It would appear that at the date of the filing of the map of definite location, this tract was in the possession of one Duck, but whether he was qualified to make entry under the settlement laws is not shown. In the absence of such showing I must hold that the case as made is not sufficient to entitle Pennington to the protection intended to be granted by the act of March 3, 1887. Your office decision is accordingly affirmed.

CURNUTT v. LAWRENCE.

Motion for review of departmental decision of May 11, 1897, 24 L. D., 428, overruled by Secretary Bliss, July 27, 1897.

CONTEST—PREFERRED RIGHT OF ENTRY.

HILL v. GIBSON.

No preferred right is secured under a contest filed during the pendency of government proceedings against the entry of record, if such entry is canceled as the result of said proceedings.

Secretary Bliss to the Commissioner of the General Land Office, July 27, 1897.
(W. V. D.) (C. J. W.)

On October 4, 1893, George W. Gibson made homestead entry, No. 1386, for the NE. $\frac{1}{4}$ of Sec. 15, T. 29 N., R. 7 W., Enid, Oklahoma.

On April 20, 1895, Gibson filed in the land office at Enid an affidavit in which he stated that he had just learned of an unintentional omission upon his part in the preparation of his application and entry papers; that he had in December, 1886, made entry of a quarter section of land in western Kansas which he had been compelled to abandon on account of his poverty and the prevalence of drought in that section; that he had but recently learned that these facts should have been made to appear in his application for second entry; that he was residing upon his last entry which was made in good faith, and that there was no contestant of his right, and he prayed that his right be restored, and his entry held intact. This affidavit was forwarded to your office; and on June 25, 1895, your office, by letter "C" addressed to the register and receiver at Enid, Oklahoma, held that Gibson's affidavit furnished no description of the land entered by him in Kansas by which it could be identified, and that he would be allowed thirty days within which to file a description, and on failure to do so within said time, his entry would be held for cancellation. Gibson was notified of his right of appeal, but took no action.

On March 14, 1896, your office canceled said homestead entry, by letter "C", of that date. The registered letter notifying him of the action taken, and of his right of appeal, was returned unopened, as reported by the local officers.

On August 4, 1895, Edward C. Hill filed affidavit of contest against said entry, alleging abandonment, and on October 2, 1895, the local officers ordered a hearing for November 12, 1895. On said day the defendant was adjudged to be in default, after personal service, and contestant submitted evidence in support of his charge.

The local officers recommended the cancellation of the entry, and that the contestant be granted preference right of entry, and the record was forwarded to your office.

On March 21, 1896, your office passing upon said record, held that, as the contest against the entry was filed after the action taken by your office of June 25, 1895, looking to the cancellation of the entry, and which resulted in its cancellation, the contest should be dismissed.

From this decision Hill has appealed, and the only question presented is, whether or not under the facts stated Hill is entitled to the preference right of entry.

The preference right of a successful contestant to make entry of the land restored to the public domain, by his contest, applies only to cases where the cancellation of the entry is not attributable to any other cause, but is the result of the contest, and such contest cannot be initiated pending an inquiry into the validity of the entry by the government of its own motion.

No preferred rights are secured under a contest filed during the pendency of government proceedings against the entry of record if such entry is cancelled as the result of said proceedings. *Drury v. Shetterly* (9 L. D., 211), and *Arthur B. Cornish* (9 L. D., 569).

The right is partly as compensation for information furnished, which leads to the cancellation of the entry. Here the defendant himself furnished the information which led to the decision in which his entry was held for cancellation, and neither the information, nor the action of your office, was induced by plaintiff's contest; for it was not initiated until after the information was given and the action taken which resulted in the cancellation of the entry.

Your office decision is affirmed.

TIMBER CULTURE CONTEST—CHARACTER OF LAND—COMPLIANCE WITH LAW.

STREETER *v.* ROLPH'S HEIRS.

A timber culture entry will not be canceled on a charge that the land is not devoid of a natural growth of timber, if the entry, at the time when made, was in due accordance with the rulings of the Department as to the character of land subject to such appropriation.

During the pendency of a timber culture contest the entryman is not excused from compliance with the law; and upon the death of the entryman the law casts upon his heirs the burden of showing due compliance with the terms of the statute.

Secretary Bliss to the Commissioner of the General Land Office, July
(W. V. D.) 27, 1897. (C. W. P.)

I have considered the appeal of the heirs of John T. Rolph from your office decision of November 30, 1896, holding for cancellation the timber culture entry, No. 1361, of John T. Rolph, of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 1, T. 16 N., R. 3 E., Lincoln land district, Nebraska.

It appears from the record that John T. Rolph made timber culture entry of this land on May 23, 1881. On August 19, 1895, Isaac Streeter filed a contest against said entry, alleging, in substance, that the section in which said land is situated is not devoid of natural timber, and that said Rolph never, at any time, plowed, cultivated, planted trees or seeds on the same, and has failed to make final proof within the time required by law.

John T. Rolph died on March 21, 1889, and notice of this contest was served on his heirs, who appeared by attorney at the hearing before the local officers, and defended the entry.

The local officers found that "the first allegation was not sustained by the evidence, and that Rolph had utterly failed to comply with the timber culture law in planting trees, etc., and had failed to make final proof within thirteen years," and recommended the cancellation of timber culture entry No. 1361.

The heirs of Rolph appealed. Your office affirmed the judgment of the local officers. A further appeal brings the case before the Department.

For the early history of this entry reference is made to the case of *Streeter v. Rolph*, 21 L. D., 10.

The evidence as to whether the land at the time of entry was legally subject thereto is conflicting, but by a preponderance of the testimony, it appears that there is a draw or low piece of ground passing over the NW. $\frac{1}{4}$ of said section, and that at the time of Rolph's timber culture entry there were four or five bunches or clusters of willow trees of natural growth, perhaps about twenty trees, growing along this draw, and a few cottonwood trees near its banks; that there were several hundred ash trees, scattered over about seven or eight acres, growing in clusters.

In the case of *Blenkner v. Sloggy*, 2 L. D., 267, the trees, some six hundred ash, oak, and underbrush, were scattered over five or eight acres, and the entry was allowed.

In the case of *Bartch v. Kennedy*, 3 L. D., 437, it was found that there were from five to six acres of trees of different kinds, and it was held that the testimony failed to show such a natural growth of timber as would make a timber culture entry illegal.

In the case of *Crottinger v. Lowe*, 11 L. D., 426, it was shown that there was a small stream flowing through the tract, and that along its slope there grew some water-elm, cottonwood, ash, and box-elder trees. The entry was made in 1883, and it was held that the case came under the liberal rulings of the Department, which prevailed prior to October 11, 1887, when the case of *James Spencer* (6 L. D., 217) was decided.

In the case of *Nichols v. Geddes*, 16 L. D., 42, the evidence showed that the section contained scattered clumps of live oak, sycamore, and willows, most of them small in size, and of the character of brush. It was held that, under the rule of the Department which prevailed when the entry was made (May, 1887), it was properly allowed.

In the case at bar, at the time the entry was made, the liberal rulings of the Department prevailed, and in accordance with the decisions cited, I am of opinion that the entry was properly allowed.

Upon the charge of failure to comply with the timber culture law, there is but little conflict in the testimony submitted. Byron Streeter and John T. Rolph are both dead. Rolph died March 21, 1889. Byron Streeter went upon the land in 1871, and his family have since lived there. Rolph settled on the land in 1874, and his family have lived there ever since.

The evidence shows that John T. Rolph, in his life time, attempted several times to plow the land and was prevented by Byron Streeter; that in 1882 he went upon the land in the night time and did some plowing. In 1883 and 1884 or 1885, he attempted to plow, but Byron Streeter would not let him. Since then, until after the contest was instituted, when C. W. Crawford, a son-in-law of Rolph, plowed about two acres, neither John T. Rolph nor any of his heirs have done, or attempted to do any work upon the claim.

It is contended that the heirs were not required to cultivate the land, because of the pendency of the application of Byron Streeter for reinstatement of his homestead entry. But it is well settled that during the pendency of a timber culture contest, the entryman is not excused from complying with the law (*Byrne v. Dorward*, 5 L. D., 104; *Simms v. Busse*, 14 L. D., 429), and upon the death of the entryman the law casts upon his heirs the burden of showing compliance with the law. *Rabuck v. Cass*, 5 L. D., 398.

Then, it is urged that your office decision is in conflict with the order made by the Department in the case of *Streeter v. Rolph*, *supra*, which, it is alleged, "gave to the heirs of Rolph the right to make proof upon future compliance with law." But the only question in that case was, whether Streeter's possession of the land and his improvements thereon operated to prevent Rolph from making timber culture entry. The Department held that the effect of Mrs. Green's relinquishment of her entry was to restore the quarter-section covered by it to the public domain and render it subject to entry by any qualified applicant; that Streeter's former void entry was no bar to his right to make second entry of the same land if he had sought to do so; that Streeter's possession did not prevent Rolph's right to make timber culture entry, subject to Streeter's right to make homestead entry, within three months, because of prior settlement. Streeter having taken no steps to place his claim of record within three months by filing contest or otherwise, and having allowed several years to elapse before moving to reinstate his original entry, is too late as against the rights of an intervening entryman, it appearing from the record and evidence that he did have written notice of the fact that his entry was held for cancellation, and that he did not appeal. It is added:

Rolph's rights are purely legal and it seems to be a great hardship for Streeter to lose his home and his valuable improvements, but he has been guilty of such laches as to render the hardship remediless, in the presence of intervening rights.

Your office decision is accordingly affirmed.

RAILROAD GRANT-INDEMNITY WITHDRAWAL-ADJUSTMENT.

NORTHERN PACIFIC R. R. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. ET AL.

An indemnity withdrawal for the benefit of the Northern Pacific grant is in violation of the terms of said grant, and inoperative as against an authorized withdrawal on behalf of another grant.

If the Northern Pacific company, in the selection of indemnity, waives the privilege conferred by the order of May 28, 1883, dispensing with the specification of loss, and assigns a basis which proves to be invalid, it is not entitled to plead the protection of said order.

The right of said company to select indemnity within the second belt cannot be recognized, unless it is made to appear that the loss specified, as the basis of such selection, is the result of a disposal occurring in the interval between the date of the granting act and that of definite location.

On account of the consolidation of the Northern Pacific and Lake Superior lines of railroad between Thomson and Duluth, the grant to the first named company must be charged with all lands received by the latter company, between said points, under its prior grant, and for the lands so taken by said company, whether within its primary or indemnity limits, the Northern Pacific is not entitled to indemnity.

Secretary Bliss to the Commissioner of the General Land Office, July 27,
(W. V. D.) 1897. (J. L. McC.)

Your office, by letter of June 26, 1895, took action upon Northern Pacific indemnity list No. 24, St. Cloud land district, Minnesota, filed November 5, 1883, embracing 4657.45 acres.

The Northern Pacific Railroad Company has appealed from said action, in so far as regards three of the tracts embraced in said list.

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 11, T. 128, R. 34, is within the indemnity limits of both the Northern Pacific Railroad and the St. Paul, Minneapolis and Manitoba Railway, St. Vincent Extension. It was free from all claim at the date of the withdrawal for the benefit of the two companies named. The decision of your office, appealed from, held that, inasmuch as the withdrawal for the latter company was authorized, while that for the Northern Pacific Railroad was without authority of law, the St. Vincent company's selection would be allowed, and the Northern Pacific Company's rejected.

From this branch of your office decision the Northern Pacific Company appeals, alleging, (1) that it was error to hold that there was no authority of law for the withdrawal of said lands for said company.

In this respect your office decision was correct, as has been held by the Department in the case of Jennie L. Davis (19 L. D., 87), and many others.

Appellant alleges (2) it was error to hold that the selection by the St. Paul, Minneapolis and Manitoba Company should stand and that of the Northern Pacific Company be rejected.

The decision in this respect was correct, as was decided by the Department in the essentially similar case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Keslik (19 L. D., 275).

The Northern Pacific Railroad Company appeals, further, from so much of your office decision as rejects its application to select the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 15, T. 128, R. 34, for the same reason as given in connection with the preceding tract; also for the further reason:

That said tract, having been withdrawn for the Northern Pacific Railroad Company December 26, 1871, and selected by the company November 5, 1883, which filed re-arranged list describing lost lands June 16, 1892, it has the better right to the land—the St. Paul, Minneapolis and Manitoba company not having made its selection until March 25, 1885, and filed re-arranged list until June 6, 1894.

The withdrawal for the benefit of the Northern Pacific Company was unauthorized by law, and of no effect (*supra*). The tract was withdrawn for the benefit of the St. Paul, Minneapolis and Manitoba Company (St. Vincent Extension) by your office letter of February 6, 1872, and remained withdrawn until May, 1891. Prior to the revocation of the withdrawal, the last named company (on March 25, 1885) selected the land. It is true that the selection of that date designated "in bulk" the losses forming the bases for such selections. But the Department has held that

indemnity selections accompanied by designation of losses in bulk, made prior to the specific departmental requirement that lost lands should be arranged tract for tract with the lands selected, operate to protect the right of the company as against subsequent applications to enter, made prior to said requirement, and the re-arrangement of losses in accordance therewith

(St. Paul, Minneapolis and Manitoba Ry. Co. v. Lambeck, 22 L. D., 202, syllabus).

Under the directions given in the La Bar case (17 L. D., 406), the St. Paul, Minneapolis and Manitoba Railway Company was, in December, 1893, called upon to re-arrange its indemnity selections so as to designate, tract for tract, the lands lost in place, in lieu of which selections had been made. Responsive to this call the company, on June 6, 1894, filed the list now under consideration, in which the same losses were used that constituted the bases of selection in its former list (of March 25, 1885), but re-arranged so as to show the losses tract for tract. The company's rights under its selection of 1885 were therefore duly protected.

The Northern Pacific company appeals, further, from so much of your office decision as rejects its claim to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and lots 1 and 2 of Sec. 13, T. 123, R. 35.

This tract was within the primary limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension); but at the date when the right of that company would otherwise have attached (December 19, 1871), it was embraced in the homestead entry of one Washington Morse, made November 1, 1865, and canceled March 24, 1874. It was therefore excepted from said grant.

The land is also within the second indemnity limits of the grant to the Northern Pacific Railroad Company, which applied to select the same, per list 24 (*supra*), on November 5, 1883.

On September 6, 1884, Lars H. Stenoien made homestead entry for said tract. Final certificate was issued May 28, 1890, and the papers transmitted to your office.

An examination of said papers disclosed the conflict between said entry and the claim of the railroad company; whereupon your office ordered a hearing to ascertain the status of the land at the date of the company's application to select (November 5, 1883, *supra*).

From said decision ordering a hearing Stenoien appealed to the

Department—which, on May 12, 1891, dismissed said appeal, on the ground of its having been taken from an interlocutory proceeding by your office, and directed that the hearing proceed (12 L. D., 495).

Said hearing was had on July 28, 1891, all parties in interest being present. Upon the testimony taken the local officers decided in favor of Stenoien.

The company appealed to your office, which found that Stenoien was a citizen of the United States; that he settled on the land in 1881, and has continued to reside thereon and cultivate and improve the same ever since, using it as a home for himself and his family; and your office holds that his claim based upon such residence, cultivation, and improvement defeated the company's right of selection.

Counsel for the company direct attention to the fact that at the hearing the witnesses for the entryman were, besides himself, Hans Larson, the father of the entryman; Coston Nelson and Lars Peterson, his cousins; and asserts that "the testimony given in final proof and that given at the hearing subsequently had is wholly irreconcilable and absolutely contradictory." Hence, they contend, such testimony ought not to be relied upon and made the basis of a decision.

As I view the case, it will not be necessary to consider the veracity of the witnesses in order to arrive at a conclusion therein. It will be sufficient to consider the question of the validity of the selection, by inquiring whether the company has in reality suffered any loss for which it has a claim for indemnity under the granting act.

Counsel for the company contend, in substance, that it is immaterial whether or not the loss specified was valid, inasmuch as the departmental order of May 28, 1883 (12 L. D., 196), relieved said company from the necessity of specifying losses. But the Department has held, in the case of the Northern Pacific R. R. Co. v. Larson (19 L. D., 233), that where the company waives the privilege conferred by the order of May 28, 1883, and designates a basis, which basis proves to be invalid, it is not entitled to plead the protection of said order. If it should be found that the basis in the case at bar was invalid, it would come within the above ruling.

Furthermore, the order of withdrawal issued by your office for this portion of the line of road (on December 12, 1871), even if it had been authorized by law, could not have affected the land here in controversy, for the reason that it was then embraced in the homestead entry of Washington Morse, made November 1, 1865, and canceled March 24, 1874 (*supra*); and the order of May 28, 1883, did not apply to such lands. (Northern Pacific R. R. Co. v. John O. Miller, on review, 11 L. D., 428.)

The list (No. 24, St. Cloud district, Minnesota), as re-arranged, sets forth that the selection of lots 1 and 2 and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 13, T. 128, R. 35, was based upon the alleged loss of the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 17, T. 51 N., R. 17 W., same land district.

The land last described appears, upon an investigation of the maps of your office, to be situated within the twenty-mile (indemnity) limits of the grant to the Lake Superior and Mississippi (formerly St. Paul and Duluth) Railroad Company.

The records of your office show further that said land was withdrawn for the benefit of said (Lake Superior and Mississippi) railroad company on May 26, 1864—which was more than a month prior to the date (July 2, 1864) of the grant to the Northern Pacific Railroad Company.

The joint resolution of May 31, 1870 (16 Stat., 378), provided, among other things, that the Northern Pacific Railroad Company might receive indemnity (in States through which it passed) inside the forty-mile limits and outside the thirty-mile limits of the road, for lands sold, reserved, or otherwise disposed of, subsequently, to the date of the granting act and prior to that of the definite location of the road; in accordance with which the Department has held that the right to select indemnity within the second belt can not be recognized unless it is made to appear that the loss specified as the basis for such selection resulted from a disposal occurring in the interval between the date of the granting act and that of definite location. (See Northern Pacific R. R. Co., 18 L. D., 596; same *v.* Larson, 19 L. D., 233.)

As the land designated as the basis for the selection now in controversy was reserved, by withdrawal for the benefit of the Lake Superior and Mississippi company, prior to the date of the grant to the Northern Pacific Company, and is opposite that part of the line between Thomson Junction and Duluth, said tract could not inure to the benefit of the last-named company, nor can indemnity therefor be allowed within the second indemnity belt.

The Department has recently rendered several decisions bearing directly upon the status of lands within the overlapping limits of the Northern Pacific grant and the Lake Superior and Mississippi grant. The syllabus of a decision rendered on August 27, 1896, reads as follows (23 L. D., 204):

In the adjustment of the grant to the Northern Pacific, between Thomson's Junction and Duluth, the land covered by the prior grant to the Lake Superior Company must be deducted, so that between said points the Northern Pacific Company will take only the granted lands within the lateral limits of its own grant which fall outside the limits of the former grant, and will be entitled to indemnity only for losses sustained outside the limits of the former grant.

To the same effect is the departmental decision of October 29, 1896 (23 L. D., 428).

The fact that the land now in controversy is situated outside the granted limits and within the *indemnity* limits of the Lake Superior and Mississippi Railroad does not alter the case. In returning unapproved list No. 19, Northern Pacific Railroad Company, St. Cloud land district, on November 17, 1896 (24 L. D., 320), after quoting in part the provisions of section 3 of the act of July 2, 1864, and a paragraph

of the decision last above cited (relating to the Lake Superior and Mississippi Railroad Company), the Secretary adds:

The intention of Congress evidently was to provide against making a double grant where two land grant railroads were found to be upon the same general line; and this can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made, opposite the portion of the lines which are similar, whether within the primary or indemnity limits of that grant.

Thus the Department has decided that the Northern Pacific Railroad Company had no right to select lands in lieu of lands alleged to have been lost in place, which were in the same situation, as regards the Lake Superior and Mississippi Railroad, as that which formed the basis for the attempted selection by the Northern Pacific Railroad Company of the land here in controversy, claimed by Stenoien. Hence, whether Stenoien's residence, cultivation and improvements were sufficient to bar selection by the company or not, its claim thereto must be held invalid.

For the reasons herein given (rather than for those set forth by your office), the decision of your office, disallowing the claim of the company, and holding Stenoien's homestead entry intact, is affirmed.

RAILROAD GRANT—LAND EXCEPTED—MINERAL CLAIM.

SANDERS *v.* NORTHERN PACIFIC R. R. CO.

A mineral application made after the filing of the map of general route, and prior to definite location, and pending at the latter date, is a claim under the excepting clause in the grant to the Northern Pacific that operates to exclude the land covered thereby from said grant.

Secretary Bliss to the Commissioner of the General Land Office, July 28,
(W. V. D.) 1897. (F. W. C.)

Upon the petition for certiorari filed by the Northern Pacific Railroad Company, the case of Junius G. Sanders against said company, involving the NW. $\frac{1}{4}$ of Sec. 21, T. 10 N., R. 3 W., Helena land district, Montana, was ordered to be forwarded to this Department upon the appeal filed by said company from your office decision of April 19, 1892, holding said tract to have been excepted from the operation of its grant. (15 L. D., 187.)

In said order the facts relative to the status of said tract, and the previous proceedings had thereon, is fully set out. The sole question raised by the appeal was whether certain mineral applications made after the filing of the map of general route, February 21, 1872, and before the definite location of the road, July 6, 1882, which applications had not been canceled at the latter date, served to except the tract embraced in said applications from the operation of the grant to said company.

The Northern Pacific Railroad Company having brought an action in the courts to recover possession of the tract involved in this case, action was suspended by this Department to await the result of the case in the courts. The case begun by the company was duly prosecuted to the Supreme Court of the United States, resulting in its decision of April 19, 1897 (166 U. S., 621), in which it was held that the land in question was embraced in a claim at the date of the filing of the map of definite location within the meaning of the excepting clause contained in the grant of July 2, 1864 (13 Stat., 365), and did not, therefore, pass to the railroad company under said grant.

In view thereof, further consideration of the case by this Department is unnecessary, and the record is herewith returned with directions that the tract involved therein be disposed of without regard to the claims set up by the company under its grant.

FOREST FIRES—ACT OF FEBRUARY 24, 1897.

NOTICE TO THE PUBLIC.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 28, 1897.

The attention of the public is called to the fact that immense areas of the public forests are annually destroyed by fire, originating, in many instances, through the carelessness of prospectors, campers, hunters, sheep-herders, and others; while in some cases the fires are started with malicious intent.

Warning is hereby given that the origin of all forest fires will be closely investigated, and, where the fire is ascertained to have originated through carelessness or design, the persons implicated will be prosecuted to the full extent of the law.

The public generally is requested to aid the officers of the Government in its efforts to check the evil referred to, and in the punishment of all offenders.

The Act of Congress, approved February 24, 1897, entitled "An Act to prevent forest fires on the public domain," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person who shall wilfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing

to do so shall be deemed guilty of a misdemeanor, and upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the lands where the offense was committed are situate.

BINGER HERMANN,
Commissioner of the General Land Office.

Approved:

C. N. BLISS,
Secretary of the Interior.

PRACTICE—NOTICE—PUBLICATION—MOTION TO DISMISS.

SMITH v. MURPHY.

The affidavit required as the basis of an order for the publication of a notice may be made by any person who possesses the requisite information.

A formal order for the publication of notice is not essential. It is sufficient if the local officers authorize the publication either by formal order or verbally.

If, on the conclusion of the contestant's testimony, the contestee moves a dismissal, on the ground that the evidence submitted does not warrant a judgment of cancellation, and said motion is overruled, the contestant should be given an opportunity to submit evidence in support of the entry.

Secretary Bliss to the Commissioner of the General Land Office, July 28,
(W. V. D.) 1897. (C. W. P.)

On September 19, 1893, Peter J. Murphy made homestead entry, No. 136, of the NW. $\frac{1}{4}$ of Sec. 34, T. 27 N., R. 14 W., Alva land district, Oklahoma Territory.

On December 17, 1894, Ruthie O. Smith filed an affidavit of contest against said entry, alleging abandonment.

On February 14, 1895, John H. Gilmore, claiming to act as agent for contestant, filed an affidavit, "to secure service by publication," in which he says:

That he is well acquainted with the tract of land embraced in the contest above set out. He further says that he is acquainted in that neighborhood and has talked with people who would be most likely to know of the address of the above named Peter J. Murphy, and that all of them tell him that he is not now in the Territory of Oklahoma and that they do not know where he is. That personal service could not be made upon him in the said Territory. That affiant has talked with a number of the people and that he does not know where the said Murphy is, and that he is unable to learn where he is. That to this affiant's best knowledge Murphy's last known residence was Ft. Omaha, Neb.

Publication of notice was thereupon ordered and made.

On May 8, 1895, a hearing was had before the register and receiver. The contestant appeared in person and by attorney and the defendant,

specially, by attorney, who moved to quash the service of notice and dismiss the contest,

for the reason that no sufficient affidavit for publication was ever made, and, as far as shown, no legal ground existed for such service, and for the further reason that no sufficient service has been made.

This motion was overruled. The contestee excepted. The contestant then submitted her testimony and contestee's attorney demurred to the evidence, and moved to dismiss the case, "for the reason that the evidence does not establish the facts sufficient to entitle the contestant to recover in this action." This motion was not decided by the register and receiver upon the trial, but, on July 22, following, they rendered a decision holding "that the entryman has abandoned the tract of land involved for a period of more than six months next preceding the service of notice herein," and recommended that the entry be canceled.

An appeal was taken by the contestee, and, on February 20, 1896, your office affirmed the judgment of the register and receiver.

The case is now before the Department on appeal from your office decision.

The appeal raises a question as to the sufficiency of the notice of contest. It is urged: (1st) That the affidavit should have been made by the contestant or her attorney; (2d) That the statement of facts in the affidavit does not furnish a basis for an order of publication; (3d) That there being no order for the publication, it was without authority.

Upon the first point, it is settled that the affidavit may be made by any person who possesses the requisite information. *Bradford v. Aleshire*, 15 L. D., 238; *Wagers v. Nelson*, 22 L. D., 566.

Upon the second point, I think the allegations in the affidavit were a warrant sufficient for the order of publication. See *Wagers v. Nelson*, *supra*.

Upon the last point, the attorney for the contestee is in error. The record shows that publication *was* ordered. A formal order is not essential. It is sufficient if the local officers authorize the publication, either by formal order or verbally. *Olsen v. Eagan*, 21 L. D., 277.

It is assigned as error by contestee, in his appeal to the Department, that it was error in the local officers to render a decision on the merits of the contest without giving him an opportunity to submit evidence in his own behalf, and that your office erred in sustaining the decision of the local officers and cancelling his entry. I am of opinion that this objection is well taken. By the decision of the register and receiver the motion to dismiss was in effect overruled. An opportunity should then have been given to the contestee to offer evidence in defence of his entry. *Lein v. Botton*, 13 L. D., 40; *Bradford v. Aleshire*, 18 L. D., 78.

You will therefore direct the register and receiver to continue the hearing in the case, after giving both parties due notice of the time set for the hearing, and, if the contestee fails to offer evidence in support of his entry, it will be canceled.

The decision appealed from is modified accordingly.

PRACTICE—APPEAL—CERTIORARI.

PATTERSON v. BEACOM ET AL.

An appeal from a decision of the local office operates to divest said office of its jurisdiction in the case; and the withdrawal of appeal on the part of one of the appellants therein will not reinvest said office with jurisdiction.

A writ of certiorari may properly issue to the local office in a case that requires such action.

Secretary Bliss to the Commissioner of the General Land Office, July 28,
(W. V. D.) 1897. (G. B. G.)

George W. Patterson, claimant under act of Congress approved March 3, 1887 (24 Stat., 556), for the SW. $\frac{1}{4}$ of Sec. 3, T. 97, R. 42, O'Brien county, Iowa, has applied to the Department for a writ of certiorari to the local land office at Des Moines, Iowa: "To direct the present register and receiver of the United States Land Office at Des Moines, Iowa, to certify to the Hon. Secretary the proceedings" in the above styled case.

The application is in all respects regular, and it is set out as grounds therefor that, on April 21, 1897, the said local officers, after a hearing duly and regularly had therein, rendered their joint decision in the case in favor of the homestead applicant, Louis Hoffman, and adverse to the homestead claimant, James A. Beacom, and adverse to this petitioner; that the said James A. Beacom duly appealed from said decision, as did this petitioner; that thereafter, on motion of the said Beacom, the local officers permitted him to withdraw his appeal and file a motion for a rehearing of the cause, which motion was granted on June 16, 1897, and a new hearing ordered thereon for September 14, 1897.

The order granting a new trial is as follows:

This case comes on before the register and receiver on the application of James A. Beacom for rehearing, which application is based, first, upon the fact that the register and receiver did not take recognition of the law passed in 1894, extending the right of a second homestead entry, and upon the further fact that if a rehearing is granted he will be able to show good and sufficient reasons for not completing his homestead entry made in Dakota and that he comes under the class of persons privileged to make a second homestead entry by reason of the law passed in 1894.

Without at this time entering into a discussion of the legal points involved, we are of the opinion that in order to arrive at the facts fully pertaining to the rights of the parties hereto a new trial is necessary. Wherefore it is ordered that the decision of the register and receiver, made April 21, 1897, be and the same is hereby set aside and a new trial is ordered to be held at the U. S. Land Office at Des Moines, Iowa, on the 14th day of Sept., 1897, and the parties hereto are hereby notified of this order and summoned to appear at said time and place.

EDWARD B. EVANS, *Register.*

WILLIAM H. TURBETT, *Receiver.*

Rule 80 of Practice provides that "No officer shall entertain a motion in a case after an appeal from his decision has been taken."

The appeals of Beacom and Patterson are alleged to have been duly

and regularly made, and as such they operated to deprive the local officers of jurisdiction in the case, and the withdrawal of Beacom's appeal would not reinvest those officers with jurisdiction.

I am of opinion, therefore, that the local officers exceeded their authority in issuing the above order.

The petitioner has invoked the proper remedy. *Wood v. Goodwin* (10 L. D., 689).

I have therefore to direct that you order the local officers to transmit the record in the cause to your office, without delay, for such action as may seem proper.

RAILROAD LANDS—ACTS OF JUNE 22, 1874, AND MARCH 3, 1887.

POWER *v.* OLSON ET AL. (ON REVIEW.)

The provisions of the act of June 22, 1874, and section 5, act of March 3, 1887, are remedial in character, and hence should receive a liberal construction, and should also be construed *in pari materia* together with the original granting act in case of an application to purchase under said section 5. It must therefore be held that lands in even-numbered sections selected under the act of 1874, are from the time of such selection the "numbered sections" of the grant as such phrase is used in said section 5, and may be purchased thereunder if said indemnity selection proves invalid.

The protection given to settlers by the second proviso to section 5, act of March 3, 1887, is restricted to such persons as may have settled in good faith after December 1, 1882, and before the passage of said act, claiming a right to enter under the settlement laws in ignorance of the rights or equities of others in the premises.

Secretary Bliss to the Commissioner of the General Land Office, July 28,
(W. V. D.) 1897. (W. M. W.)

On the 16th of October, 1896, the Department decided the above entitled case, affirming your office decision of April 11, 1896, denying James B. Power the right to purchase the land involved under the 5th section of the act of March 3, 1887. See 23 L. D., 387. Power has filed a motion for review of said departmental decision, and in support of it has submitted briefs and has been heard orally.

The facts are, substantially, as follows:

On March 31, 1877, the Northern Pacific Railroad Company, per list No. 5, selected, under the act of June 22, 1874 (18 Stat., 194), lots 1, 2, 3 and 4, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4; lots 1, 2, 3 and 4, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of Sec. 6; the NW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 8, all in T. 135, R. 52; also the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 34, T. 136, R. 52, Fargo, North Dakota, land district. This selection was made in lieu of certain other lands within the indemnity limits of the grant to said road in the State of Minnesota, which indemnity lands had never, as a matter of fact, been selected by said company on account of losses within the place limits of its grant, but were relinquished to

the United States on account of settlement claims thereon that attached after said lands were withdrawn for the benefit of the company and while the withdrawal was recognized.

Power purchased the lands in question from the railroad company, under contracts, in 1880 and 1881, and immediately went into possession of them and has continuously remained in possession ever since. He received deeds from the company, dated January 20, 1883, reciting a consideration of \$2,900.

On May 13, 1891, your office held said selection list for cancellation, for the reason that the bases for it were invalid, except as to the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 6, and the NW. $\frac{1}{4}$ of Sec. 8, and said list was canceled by your office on September 30, 1891, except as to the two tracts above named. The company took no appeal from your office decision canceling said selection list, and consequently it became final as against the company.

Power is shown to be qualified to purchase under the act of March 3, 1887. The land was free from settlement claims when he made his purchase from the company.

On December 2, 1891, Gunder Olson made homestead entry for the SE. $\frac{1}{4}$ of Sec. 34, T. 136, R. 52; and on December 8, 1891, Joseph A. Beeton made homestead entry for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section.

Power first applied for the land on December 18, 1891, under the 4th section of the act of March 3, 1887, which was rejected by your office, and upon his appeal to the Department, your office decision was affirmed April 16, 1894 (286 L. and R., 126), and on review October 12, 1894 (296 L. and R., 1). The grounds upon which his right to perfect title under said section was denied were that such right only exist when the lands were unearned under the grant, and erroneously certified or patented to the company, as held in *Wright v. Coble*, 9 L. D., 199, and *Drake et al. v. Button*, 14 L. D., 18.

These lands are all situated in even numbered sections; the grant made to the Northern Pacific Railroad Company was of lands situated in odd numbered sections.

In the decision sought to have reviewed the Department held that the right of purchase under section 5 of the act of March 3, 1887, is limited to the numbered sections prescribed in the grant, and, therefore, can not be exercised to secure title to even numbered sections selected under the indemnity provisions of the act of June 22, 1874.

When the case was decided by the Department on the merits, the only question presented was, whether Power is entitled to make proof and payment for the land involved under the 5th section of the act of March 3, 1887, and necessarily the only material question to determine in passing on the motion for review is, whether the Department erred in applying the law to the case in the decision heretofore rendered.

The Northern Pacific Railroad Company is not a party to this proceeding; the decision of your office of September 30, 1891, canceling its

selection list was not appealed from by the company; such decision was final and conclusive as against the company. This controversy is solely between Power and the government and the homestead entryman; therefore, it is not necessary to discuss or pass upon the contention of counsel as to whether the lands in controversy passed to the railroad company under its grant as "granted lands," or "lands granted." Power's application is based upon the claim that the title to the lands did not pass to the company, and for that very reason he asks to purchase under the act of 1887.

In the first ground of the motion for review, it is claimed that: "Said decision shows that the case was decided upon a strict literal construction of section 5 of the act of March 3, 1887." This contention must be conceded to be correct. It is further contended that said section of said act is remedial in character, and should be liberally construed; that in construing it, in the case at bar, the granting act to the railroad company, and the act of June 22, 1874, should be considered and construed as being *in pari materia*. If these contentions are well founded, the departmental decision was erroneous, and should be reversed and the right of purchase of the land involved be allowed to Power.

The third section of the act of July 2, 1864 (13 Stat., 365), granted to the Northern Pacific Railroad Company . . . every alternate section of public land not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile . . . and whenever . . . any of said sections, or parts of sections, shall have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof . . . in alternate sections and designated by odd numbers within the indemnity limits fixed by said act.

The act of June 22, 1874 (18 Stat., 194), provides:

That in the adjustment of all railroad land grants . . . if any of the lands granted be found in the possession of an actual settler, whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land office, the right of said road was declared to have attached to such lands, the grantees, upon proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant, not otherwise appropriated at the date of selection.

By act of August 29, 1890 (26 Stat., 369), the act of 1874 was amended, so as to remove the requirement that the entry or filing should have been allowed, and extending the benefits of the act to claims based upon settlements made upon railroad lands subsequent to the attachment of the rights of the companies under their grants.

The 5th section of the act of March 3, 1887 (24 Stat., 556), provides:

That when any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and when the lands so sold are for any reason excepted

from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to said bona fide purchaser, his heirs or assigns.

The act of June 22, 1874, and the act of March 3, 1887, both relate to the adjustment of all railroad grants, and they should be construed *in pari materia* under familiar rules of statutory construction.

It is equally clear that the act of 1874 and the 5th section of the act of 1887 are remedial in character, and should be liberally construed in favor of all persons who may come within the mischief intended to be remedied.

The act of 1874 allows a railroad company to select, in lieu of lands relinquished under said act, "other lands"

from any of the public lands, not mineral, within the limits of its grant, not otherwise appropriated at the date of selection, to which they shall receive title, the same as though originally granted.

It is clear from this language that, when a lawful selection is made under said act by a railroad company of other sections than those specified in the granting act to such company, lands so selected become, from the date of selection, and are in legal effect, the numbered sections of such grant, irrespective of whether they be situated in the numbered sections specified in the original granting act or not, the same as though they had been originally granted.

In this case, if the selection of the company had been a valid one, there is no doubt but what Power's title under his purchase from the company would have been good, and the act of 1887 would not need to be invoked.

The company selected the land involved under the act of 1874; its selection was of record in the local land office and its validity was not questioned at the time Power purchased the land of the company, nor for a long time thereafter. At the time he purchased the land from the company, he had no means of knowing that the company would fail to receive a good title under its selection. So far as he was concerned, he occupied precisely the same position as he would if the selection had been valid, and in passing upon his right to purchase under the 5th section of the act of 1887, the selection, notwithstanding its invalidity, should be given the same force and effect as if it were valid, in so far as making the land embraced in the invalid selection the numbered sections prescribed in the grant to the road. The object and purpose of the 5th section of said act were to give relief to persons who were qualified and had purchased in good faith lands of railroad companies, which for "any reason" are excepted from the grant to such companies.

Power's equity is founded upon his purchase of the lands in question in good faith, the payment of a valuable consideration therefor, relying upon receiving a good title from the company, and through the illegality of the company's selection, as the grant is now construed, the

title he bought and paid for has failed. He has received no title to the land from the company.

Construing the act of 1874, section 5 of the act of 1887 and the granting act to the Northern Pacific Company all together as being *in pari materia*, I conclude that Power's application to purchase clearly comes within the remedial provisions of the 5th section of the act of 1887, provided his right is superior to the rights of Olson *et al.*, homestead claimants.

The Department has not been favored with an argument on the part of the homestead claimants, and therefore is not apprised of the specific claims of Olson *et al.* to the lands embraced in their entries as against Power's right to purchase under the 5th section of the act of 1887. It may be that they are relying on the second proviso to said section 5, which provides:

That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

In a long line of decisions the Department has held that the protection given to settlers by this proviso is restricted to such persons as may have settled upon the land in good faith *after* December 1, 1882, and *before* the passage of said act of 1887, claiming in good faith a right to enter the same under the settlement laws, in ignorance of the rights or equities of others in the premises. Chicago, St. Paul, Minneapolis and Omaha Ry. Co., 11 L. D., 607; Union Pacific Ry. Co. *et al.* v. McKinley, 14 L. D., 237; Stebbins v. Croke, 14 L. D., 498; McCord v. Rowley *et al.*, 18 L. D., 502; Swineford *et al.* v. Piper, 19 L. D., 9; Holton *et al.* v. Rutledge, 20 L. D., 227. Neither Olson nor Beeton has made any claim of settlement during the period named.

In the light of the facts as hereinbefore set forth it is clear that Power's right to acquire title to the land in question is superior to the rights of Olson *et al.*, the homestead entrymen.

Power's application to purchase under the 5th section of the act of 1887 will be allowed, upon his compliance with the law in the matter of making payment for the land, and thereupon the homestead entries of Olson *et al.* for the land involved will be canceled. If, for any reason, Power fails to complete his purchase within ninety days from receipt of notice of this decision, the homestead entries of Olson *et al.* will remain intact, subject to due compliance with law by the entrymen.

Departmental decision of October 16, 1896, reported in 23 L. D., 387, is hereby set aside and vacated, and your office decision of April 11, 1896, appealed from, is hereby reversed.

SECOND HOMESTEAD ENTRY—SECTION 2, ACT OF MARCH 2, 1889.

HERTZKE *v.* HENERMOND.

Section 2, act of March 2, 1889, provides for the allowance of a second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homestead law but has not perfected title thereunder, either before or since that time.

The case of *Downman v. Moss*, 19 L. D., 526, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) July 30, 1897. (F. L. C.)

This is an appeal by Charles Hertzke from your office decision of May 10, 1893, dismissing his contest against the homestead entry of Jacob Henermond, made December 9, 1892, for the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 33, T. 6 S., R. 38 W., Oberlin, Kansas.

The record shows that on December 12, 1892, Hertzke presented his homestead application for said land, but the same was rejected for conflict with the entry of Henermond. Hertzke thereupon appealed. Subsequently, however, he instituted contest proceedings against said entry, alleging that Henermond was not a qualified entryman for the reason that he had previously made an entry under the homestead law for other lands, and had relinquished the same.

No action appears to have been taken on the appeal, but the contest proceeded to trial and was heard upon an agreed statement of facts, from which it appears that on October 13, 1885, Henermond made homestead entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 9 S., R. 4 W., Oberlin, Kansas, and relinquished the same March 8, 1890.

Among the papers filed by Henermond at the date of his entry for the land in question, which are a part of the record before me, is found his affidavit to the effect that after making his original entry, he established his residence on the land covered thereby, and continuously resided thereon until the year 1890, when, owing to his poverty, the result of crop failures and other circumstances beyond his control, he was compelled to relinquish the entry; and that he has never perfected title to land under either the homestead or pre-emption law.

Accompanying the agreed statement of facts, was a motion by Henermond to dismiss the contest because of insufficiency of the grounds alleged therein. This motion was granted by the local officers, and on appeal to your office the action below was sustained.

The sole question presented by the record is whether Henermond was, on December 9, 1892, a qualified entryman under the homestead law, in view of the previous entry made by him as aforesaid. Your office held that under the provisions of Sec. 2 of the act of March 2, 1889 (25 Stat., 854), he was so qualified.

Said section provides:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not

exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated.

The decision of your office is predicated upon the theory that Henermond, having relinquished to the government his said original entry made prior to the passage of said act, has not perfected title to the land covered by such original entry, and therefore comes within the provisions of the act. The fact that the relinquishment by Henermond was made subsequently to the passage of the act, was held not to affect the question of its operation in support of his second entry.

In other words, the decision appealed from answers the question above formulated in the affirmative. It says, in effect, that an entry made prior to March 2, 1889 (the date of the act under consideration), and not then completed, but then or thereafter relinquished, abandoned, cancelled, or for any reason not perfected, does not preclude the entryman from subsequently making a homestead entry. Henermond did make a homestead entry prior to March 2, 1889. He did not complete that entry, but relinquished it in 1890. Subsequently, on December 9, 1892, he made homestead entry of another tract, to wit, the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 6 S., R. 38 W., Oberlin, Kansas. Can this entry stand, or must it be canceled because the entryman's homestead right had previously been exhausted?

Under the provisions of the general homestead law of May 20, 1862 (12 Stat., 392), but one homestead entry was or is allowable to one person, and that for a tract of one hundred and sixty acres, or less. See sections 2289 and 2298, parts of the codification of said act, in the Revised Statutes. But the act of March 2, 1889 (*supra*), made certain exceptions to the rule of law thus laid down.

It provided in section two, that any person "who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make homestead entry," etc. This is a general law applicable wherever the general land laws are applicable. There are two special acts providing for second homestead entries under certain circumstances and in specified territory. One relates to entries of Seminole Indian lands, now in Oklahoma, and bears date March 2, 1889, the same as the general act above referred to. See 25 Stat., 980 (1005). The other bears date February 13, 1891 (26 Stat., 758), and relates to what is known as the Sac and Fox country in Oklahoma.

Cases will arise, in fact cases are now pending before this Department, in which a consideration of these special acts will become necessary. They are referred to only because they point in the same direction, or relate to the same subject (that of second entries) as the general act of 1889, which controls this case.

It is to be kept in mind that the general act allows second entries to "any person who has not heretofore perfected title to a tract of land

of which he has made entry under the homestead law," with certain specified exceptions.

"Heretofore" naturally and necessarily means before March 2, 1889, the date of the act, and it presupposes the existence of a homestead entry prior to said date. Hennermond had made entry prior to March 2, 1889, but he had not at that date "perfected title" under said entry, and he never did perfect title thereunder. On the contrary, he relinquished said entry, and thereby abandoned all chance to perfect title.

It would seem, therefore, from the language of the act, that he clearly comes within the provisions of so much of section two thereof as is above quoted, and that he is entitled to make another entry.

A statute is to be construed according to its terms, and where its language is unambiguous there is little or no room for construction. The language of this statute is plain, and to adopt any construction other than that above suggested would be a departure from the ordinary use of words as spoken and written in our tongue.

Such departure, if ever called for, is not justified in the consideration of this statute, for not only is it plain, unambiguous, and direct in its provisions but it is also beneficial and remedial and should not be narrowed by a strained interpretation.

The section under consideration does not stop here. It goes on to say—"But this right (the right of second entry) shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated."

The converse of this is, necessarily, that its provisions *shall apply* to persons who *do not perfect* title to lands under the pre-emption or homestead laws already initiated.

That is, persons who do not after the passage of the act perfect title under entries made prior to the date thereof, may, under the terms of the act, make a second, or another, homestead entry. The qualifying clause above quoted from the act means this, or it has no office to perform. Its purpose is clear. But for it, a person who made homestead entry prior to March 2, 1889, and thereafter perfected title thereunder, could, under the language of the first clause of the section, make another entry and secure title thereunder, thus twice securing a homestead right in its full fruition. With the last clause, not only is such a result impossible, but by it the purpose and intent of the first clause is emphasized, and were such purpose and intent not clear from the language there used, it is made clear and certain by what follows. This view of the law has heretofore been taken by the Department.

On March 8, 1889 (8 L. D., 314), your office, with the approval of the Secretary of the Interior, issued circular instructions to registers and receivers, to guide them in administering the act of March 2, 1889.

The second section of the act allows in general terms any party who has heretofore made a homestead entry and who has not perfected title thereunder to make another homestead entry, while denying such right to any party who perfects title

to lands under the pre-emption or homestead laws already initiated, and specifically provides that parties who have existing pre-emption rights may transmute them to homestead entries and perfect title to the lands under the homestead laws, although they may have heretofore had the benefit thereof.

Therefore you will not hereafter reject a homestead application on the grounds that the applicant can not make the prescribed oath that he has not previously made such an entry, but he will be required to show by affidavit, designating the entry formerly made by description of the land, number and date of entry, or other sufficient data, that it was made prior to the date of said act, and also that he has not since perfected a pre-emption or homestead title initiated prior to that date.

Here was warrant for Henermond to do just what he did in this case.

In the case in 12 L. D., 268, decided March 21, 1891, Thomas Fitzpatrick made original or first homestead entry June 14, 1888, afterwards claiming that the tract entered was not the tract he intended to enter, and averring that the tract he intended to enter had been appropriated by another entryman, he applied to *amend* to another and a newly selected tract.

The decision held that under such circumstances he could not amend, but he could, under the act of March 2, 1889, relinquish his original entry and make entry of the tract desired, thus directly recognizing the right to relinquish an entry made prior to March 2, 1889, and not then or thereafter perfected, and make a new, or a second, entry. In fact, that this was the only relief to which he was entitled.

In *Miller v. Craig* (15 L. D., 154) it was held that a failure on the part of Miller to secure title under a homestead entry made prior to March 2, 1889, said entry being thereafter canceled for failure to comply with the law, did not defeat his right to a second entry under the act of March 2, 1889.

In *Dowman v. Moss* (19 L. D., 526) a different view was expressed. It was said that the intent of the second section of the act of March 2, 1889,

was to afford relief to those entrymen who for some reason had lost their land, and under the law were precluded from making a second entry. It was not intended to allow those who made entry before the approval of the act, to relinquish it and make a new entry.

This was not necessary to the decision in that case. It was *obiter dictum*, and will not be followed.

After full and careful consideration of the law in question, I have no hesitation in concluding that it provides for the allowance of second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homestead law but has not perfected title thereunder, either before or since that time.

The conclusion in this case therefore is that Henermond's homestead entry, made December 9, 1892, was properly allowed, and that your office decision dismissing the contest of Hertzke was and is correct. Said decision is accordingly affirmed.

RAILROAD GRANT-INDEMNITY WITHDRAWAL.

LARSON *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

Lands embraced within the indemnity withdrawal for the benefit of the main line of the St. Paul, Minneapolis, and Manitoba road, under the grant of March 3, 1857, are not by such reservation excluded from the operation of the subsequent grant of 1871 for the St. Vincent extension of said road.

The case of the St. Paul, Minneapolis and Manitoba Ry. Co. *v.* Hagen, 20 L. D., 249, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 2, 1897.* (F. W. C.)

With your office letter of March 31, 1896, was forwarded a motion, filed on behalf of the St. Paul, Minneapolis and Manitoba Railway Company, for review of departmental decision of February 10, 1896 (not reported), in which your office decision of July 31, 1894, holding that the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 131 N., R. 43 W., St. Cloud land district, Minnesota, was excepted from the grant to said company on account of the St. Vincent Extension, was affirmed.

Said motion was entertained and returned for service February 24, 1897. It has been again filed, bearing evidence of service, and was transmitted with your office letter of April 15, 1897.

The tract involved is within the indemnity limits of the grant to said company under the act of March 3, 1857 (11 Stat., 195), as adjusted to the line of location of what is known as the main line of said road. Upon the adjustment of the limits under the grant made by the act of March 3, 1871 (16 Stat., 588), for the St. Vincent Extension of said road, it was found that this tract fell within the primary or granted limits of the said grant.

The present controversy arose upon the tender of a homestead application by Christian M. Larson on September 4, 1887.

The company lays no claim to the land on account of the grant under the act of 1857, for its main line, but urges that it passed under the grant of 1871, upon the definite location of the St. Vincent Extension on December 19, 1871.

The record discloses no adverse claim to the land on December 19, 1871, nor is any alleged by Larson.

The decision under review held, following the decision in the case of said company *v.* Hagen (20 L. D., 249), that the withdrawal for indemnity purposes upon the main line, existing at the date of definite location of the St. Vincent Extension, served to except the tract from the operation of the grant under the act of 1871.

The motion for review is based upon the ground that said decision of this Department, which holds that the indemnity withdrawal for the main line will defeat the operation of the subsequent grant for the St. Vincent Extension, is in conflict with the decision of the supreme court

in the case of *Wisconsin Central v. Forsythe* (159 U. S., 46). In that case, the tract involved is within the indemnity limits of the grant made by the act of June 3, 1856 (11 Stat., 20), to the State of Wisconsin, to aid in the construction of what is known as the Bayfield branch of the Chicago, St. Paul, Minneapolis and Omaha Railroad. On account of the grant under the act of 1856, this Department withdrew the indemnity lands opposite said Bayfield branch.

On May 5, 1864 (13 Stat., 66), a grant was made to the State of Wisconsin to aid in the construction of what is known as the Wisconsin Central Railroad, and the limits under this latter grant, as adjusted to the line of definite location, overlapped the indemnity limits under the act of 1856 for the Bayfield branch of the Omaha road. In the administration of these grants, this Department held that the reservation under the act of 1856 was sufficient to defeat the operation of the subsequent grant under the act of 1864.

In the case referred to, however, the court held that lands within the indemnity limits under the act of 1856 were subject to the control of Congress, and from a consideration of the act of 1864 it was found that it was the intention of Congress to grant the same to aid in the construction of the Wisconsin Central Railroad.

In said opinion it was stated:

The land was, therefore, subject to the full control of Congress at the time of the passage of the act of 1864. What did Congress intend by that act? It had in 1856 granted to the State of Wisconsin six sections per mile to aid it in the construction of a road from Madison or Columbus, by way of Portage City, to the St. Croix River or Lake, and thence to the west end of Lake Superior, and to Bayfield, with a proviso that if the road was not completed within ten years the unsold lands should revert to the United States. Wisconsin had accepted this grant, and thus impliedly undertaken to construct the road. . . . It was evident that the inducement of six sections per mile had not been sufficient to secure the construction of the road in the comparatively uninhabited portions in the northwestern part of the State, and so Congress determined to enlarge its grant in order to secure the accomplishment of the desired end. At the same time it perceived that the public interests required an additional road running through the central portion of the State northward to the two termini on Lake Superior, named for the road from St. Croix Lake or River.

And so it passed the act of 1864. This made a grant to the same grantee, to wit, the State of Wisconsin, but expressed the terms and purposes in three separate sections. Congress evidently knew that at the time two companies had been named by the State of Wisconsin as the parties to construct the road provided for by the act of 1856. So, in the first section, it made a grant of ten sections per mile to aid in the construction of a road from St. Croix River or Lake to the west end of Lake Superior, with a branch to Bayfield; in the second, a grant in substantially like terms for a road from Tomah to the St. Croix River or Lake; and in the third, a grant also of ten sections per mile to aid in the construction of a road from Portage City, Berlin, Doty's Island, or Fond du Lac, as the State should determine, in a northwesterly direction to Bayfield, and then to Superior, on Lake Superior. In each of these three sections it named the State of Wisconsin as the grantee. Although it knew that the State had made two separate companies the beneficiaries of the act of 1856, it made no grant to those companies. It dealt in all three sections with the State, relying upon the State as the party to see that the roads were completed, and to use its own judgment as to the manner of securing such construction. The act of 1864 was,

therefore, a mere enlargement of the act of 1856, was made to the same grantee, was *in pari materia*; and is to be construed accordingly. It is not to be treated as an independent grant to a different party, and, therefore, liable to come in conflict with the rights of the first grantee.

For whose benefit was the withdrawal of the lands within the indemnity limits of the Bayfield road made? Obviously, as often declared, for the benefit of the grantee. It is as though the United States had said to the grantee: we do not know whether, along the line of road, when you finally locate it, there will be six alternate sections free from any pre-emption or other claim, and, therefore, so situated that you may take title thereto, and so we will hold from sale or disposal to any one else an additional territory of nine miles on either side that within those nine miles you may select whatever lands may be necessary to make the full quota of six sections per mile. When Congress, by a subsequent act, makes a new and absolute grant to the same grantee of lands thus held by the government for the benefit of such grantee, upon what reasoning can it be said that such grant does not operate upon those lands.

When Congress makes a grant of a specific number of sections in aid of any work of internal improvement, it must be assumed that it intends the beneficiary to receive such amount of land; and when it prescribes that those lands shall be alternate sections along the line of the improvement, it is equally clear that the intent is that if possible the beneficiary shall receive those particular sections. So far as railroads are concerned, it is the thought not merely that the general welfare will be subserved by the construction of the road along the lines indicated, but further, that such grant shall not be attended with any pecuniary loss to the United States; for the universal rule is to double the price of even sections within the granted limits. The expectation is that the company receiving the odd sections will take pains to dispose of them to settlers, and thus by their settlement and improvement increase the value of the even sections adjoining and so justify the added price. To fully realize this expected benefit it is essential that the lands taken by the company shall be as near to the line of the road as possible; and so, while selection of remote lands is permitted, it is only when and because there is a necessity of such selection to make good the amount of the grant. Obviously, therefore, an act must be construed to realize, as far as is possible, this intent and to accomplish the desired result.

The only difference between the case before the court and that now under consideration is, that in the act of 1871 Congress seems to have recognized that the State of Minnesota, the grantee under the act of 1857, had conferred the grant provided for in said latter act, for the road under consideration, upon the St. Paul and Pacific Railroad Company. And in said act it is provided:

That the St. Paul and Pacific Railroad Company may so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it may locate and construct, in lieu thereof, a line from Crow Wing to Brainerd, to intersect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, with the same proportional grant of lands to be taken in the same manner along said altered lines, as is provided for the present lines by existing laws.

In the administration of the grant under the act of 1871, the lands have heretofore been certified and patented to the State and by the State conveyed to the railroad company; and from a consideration of the decision of the supreme court in the Forsythe case I can see no

good reason for adopting a different rule in relation to the grants under the acts of 1857 and 1871, from the rule established by the court in that case. I must therefore hold that the previous adjudication of this Department, treating the indemnity reservation under the act of 1857, for the main line of the Manitoba road, as sufficient to except the land embraced therein from the operation of the grant made by the act of 1871, was error.

The decision under review is accordingly recalled and vacated; and as the tract under consideration was otherwise subject to the grant under the act of 1871, at the date of the definite location of the road, I must hold that it passed thereunder and that no rights were acquired by Larson under his application presented as aforesaid. Said application will accordingly stand rejected. The decision in the case of said company *v. Hagen*, *supra*, is overruled, and in the future administration of these grants you will be governed accordingly.

REPAYMENT—ASSIGNEE—ACT OF JUNE 16, 1880.

W. E. McCORD.

A person holding under a deed executed prior to the submission of final proof and the issuance of final receipt has no standing as an assignee under the statute providing for repayment.

The departmental decision of July 13, 1896, 23 L. D., 137, recalled and vacated.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 2, 1897. (J. L. McC.)

On May 2, 1893, May Campbell made timber-land entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 49 N., R. 6 W., Ashland land district, Wisconsin.

On January 25, 1894, your office notified the local officers that said entry was on that date held for cancellation for the reason that the land covered thereby had been "offered," and was not subject to entry under the timber-land act. Such notification was transmitted to claimant's address at Iron River (given in the entry papers as her place of residence), but it was returned unclaimed. Your office, therefore, on June 8, 1894, canceled the entry upon its records.

On September 1, 1894, W. E. McCord, claiming to be the owner of the land described, through purchase from Miss Campbell, applied in due form for repayment of purchase money, fees, and commissions. This application your office, by letter of October 10, 1894, submitted to the Department, which, on November 13, 1894, returned the same approved.

In order to obtain repayment it was necessary, according to the regulations of your office, to submit "properly authenticated abstracts of title, or the original deeds or instruments of assignment." Upon examination of the deed and abstract of title it became apparent that said deed had been made and executed by Miss Campbell prior to her

making final proof and receiving final certificate. Your office therefore, by letter of June 26, 1895, re-submitted the case to the Department, with the suggestion that, as the proof was false, the allowance of the application for repayment be canceled.

The Department, therefore, on August 12, 1895, canceled the approval of McCord's application for repayment.

On August 20, 1895, your office notified the local officers that McCord's application had been denied, for the reason above suggested. From such action McCord appealed to the Department.

The Department, on July 13, 1896, rendered a decision, the gist of which is contained in the following paragraph (23 L. D., 137-8):

Section 2362 R. S. authorizes repayment upon satisfactory proof "that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed"; and Sec. 2 of the act of June 16, 1880, provides that the Secretary of the Interior shall cause repayment to be made, "when from any cause the entry has been erroneously allowed and can not be confirmed." In the case at bar the entry of the land in question under the timber-land law was "erroneously allowed and cannot be confirmed." It is therefore embraced within the class for which repayment has been provided and directed. . . . It was canceled for a reason for which the law authorizes and directs repayment. In view of this fact, it is not material whether Miss Campbell's affidavit is true or false, and that question will not be inquired into. In my opinion repayment should be allowed.

In accordance with the decision above quoted from, McCord's claim for repayment was transmitted to the Auditor of the Treasury for the Interior Department, who, on November 12, 1896, returned the same to this Department, with the suggestion that McCord had not shown himself to be the legal assignee of the entryman, saying (*inter alia*):

I submit that W. E. McCord was never the legal assignee of May Campbell within the intent and meaning of the act of June 16, 1880, as construed and defined in Department circular, "Instructions governing repayment, etc.", of August 6, 1880, page 3, and as uniformly held in practice since that time:

"Assignees. 9. Those persons are assignees, within the meaning of the statutes, authorizing the repayment of purchase money, who purchase the land *after the entries thereof* are completed, and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation."

The paramount question of McCord's title or right appears to have been overlooked and not considered by the Department. . . . The law does not and the Interior Department never has recognized an "application", "declaratory statement," pre-emptor's claim or occupation of the land, as constituting or giving a legal, assignable, or transferable interest in or title to public lands of the United States, prior to entry of the same and the payment to a receiver of the public moneys of the purchase price of the land. Such claims constitute only a personal right to make a future purchase of certain public lands after the applicant and claimant has taken certain oaths and complied with the legal conditions and regulations.

In my opinion the Auditor of the Treasury for the Interior Department is correct in his conclusion above expressed. In the departmental decision of July 13, 1896, attention seems to have been directed to a single branch of the case; and the question whether McCord legally occupied the status of a transferee appears not to have received sufficient consideration.

Upon receipt of the letter from the Auditor of the Treasury for the

Interior Department, a copy of the same was sent to W. E. McCord, and he was notified by this Department that thirty days would be given him within which to show himself to be the legal assignee of May Campbell.

Counsel for McCord replied, under date of April 17, 1897, asking whether the record of the case does not contain—

The affidavits of said W. F. McCord, Walter P. Hoover (notary public), Mrs. May Hume (*nee* Campbell), Oliver Campbell, and another whose name I do not remember, showing that, if the deed from Campbell to McCord, which constituted the basis of said claim for repayment, bore the date of May 1, "1893," it was an error, and that in fact said deed was executed long afterward, to wit, about May, 1894.

The record contained certain affidavits from W. E. McCord, May Hume and O. H. Campbell, respectively, but none from Walter P. Hoover, or any other person than those above named. Your office was therefore directed, by departmental letter of May 18, 1897, to make an examination of its records to discover whether the affidavit of said Hoover, or of any other person bearing upon the case, was on file in your office; and if not, that you so inform said counsel, notifying him that he would be allowed thirty days in which to supply said affidavits.

The Department is now in receipt of your office letter of July 8, 1897, transmitting a letter from said counsel in which he encloses an affidavit from Walter R. Hoover, who deposes and says:

That he is the same Walter R. Hoover before whom was executed the deed from May Campbell to W. E. McCord, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 49 N., R. 6. W., Ashland, Wis. district, at Iron River, Bayfield county, Wisconsin; and that, while he has no data from which to determine the exact date of the deed, he is quite certain it was made on or about May 1, 1894, and that if the same bears date of May 1st, 1893, he is equally certain that it is erroneous, and should read 1894, instead of 1893.

The affidavits of McCord, Hume, and Campbell, above referred to, bear the impress of having been very hastily and carelessly executed. They briefly allege that if said deed bears the date of May 1, 1893, such date must be incorrect, for they remember that it was executed long after said date. None of the affidavits enters into particulars or sets forth any reason for the belief expressed.

The date at the beginning of the deed in question is written out in full: "This indenture, made the first day of May, in the year of our Lord, one thousand eight hundred and ninety-three." In the acknowledgment at the end of the deed the same date is written out in figures: "The 1st day of May, 1893."

The affidavits offered are insufficient to prove that the date inserted in the deed and certificate of acknowledgment is a mistake.

In my opinion McCord has not shown himself to be the legal assignee of the land in controversy, and cannot properly be allowed repayment therefor.

The departmental decision of July 13, 1896, is therefore hereby recalled, revoked, and vacated; and McCord's application for repayment is denied.

PRACTICE—HEARING—APPLICATION—PREFERENCE RIGHT.

HOBE v. STRONG ET AL.

A hearing will not be ordered on an allegation of irregularity in presenting an application for the right of entry, where it is apparent from the record that the right of the applicant is not dependent upon priority of application.

A successful contest against a scrip location entitles the contestant to a preferred right of entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 2, 1897. (E. R., Jr.)

The land involved in this case is the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 30, T. 62 N., R. 10 W., Duluth, Minnesota, land district. The official plat of survey of the township was filed in the local office on March 19, 1896, and the land therein became then subject to applications to enter or purchase the same.

On that date, Tharald O. Hobe presented his timber land sworn statement for the land above described, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of said section, which statement was rejected because it conflicted as to the said NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ with the homestead entry, No. 10,092, of Lawrence H. Strong, made on the same date, but prior to said statement, and as to the said NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, with the Sioux half breed scrip location made on June 3, 1887, by Philander P. Pettijohn, and with the homestead application of Hugh P. Strong, made March 19, 1896, prior to said statement. Hugh P. Strong's homestead application was at first rejected; when presented, on account of the said scrip location, which was then involved in a contest against the same by said Hugh P. Strong. But on March 20, 1896, the application was allowed and Strong was permitted to make homestead entry No. 10,095 thereunder, the local office having been then just advised by letter from your office, dated March 17, 1896, of the cancellation, on the date last mentioned, of said scrip location, pursuant to the decision of the Department dated August 20, 1895, in the contest case referred to above of said Hugh P. Strong against said Pettijohn and others (21 L. D., 111).

By his attorney, one B. N. Johnson, Hobe appealed from the rejection of the said timber land statement, assigning error as follows:

1. It was error to allow the homestead entries of Lawrence H. and Hugh P. Strong in the face of the protest of B. N. Johnson, and with the knowledge that the parties by unlawful means had secured first entrance to the land office.

2. It was error not at once to have ordered an investigation upon the charge of B. N. Johnson of the illegality of admitting these entries.

3. It was error to reject the sworn statement of this appellant, knowing that he was the only applicant for the land.

In deciding the case, July 29, 1896, your office said:

The plat of township 62 N., R. 10 W., was filed in your office on March 19, 1896.

It appears from the appeal that the land office in Duluth is located in the government building on the second story; that at 6 o'clock in the morning, when the outer door of said government building was thrown open to the public, three persons were stationed there, viz: Erik W. Lund, Gustav E. Osterberg, and appellant; that when

said door was thrown open, they rushed up the stairs and when they reached the second story, they saw three persons rush out of a toilet room; that said persons reached the land office door prior to the persons who had come in the building in the regular way; that two of these persons were the Messrs. Strong who made the entries above mentioned and that with them was their brother who was there to enable them to make their entries. The appellant wishes an investigation as to the manner in which these parties entered the building.

The township in question was thrown open to settlement and entry pursuant to the circular of October 21, 1885 (4 L. D., 202). There was nothing peculiar in the method of opening the same. It appears that the parties who made entries for the lands in controversy were the prior applicants as well as apparently the prior settlers on the land.

Under the circumstances the application for an investigation is denied, and your action rejecting his application is approved in so far as it applies to the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said Sec. 30, subject to the right of appeal. Should he so desire it, you will allow his filing for the S. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section. See 21 L. D., 145.

Hobe prosecutes an appeal to the Department, in which he assigns error in your office decision as follows:

I. It was error to hold that Hugh P. and Lawrence H. Strong have made settlement upon this land prior to their homestead entries.

II. It was error to allow their homestead entries upon this land to remain intact without inquiring into the method of procuring them.

It would appear from the affidavits filed with the appeal to your office, that said Lawrence H. and Hugh P. Strong, by some clandestine means not disclosed, secured admission to the government building at Duluth, in which the local land office is located, prior to six o'clock on the morning of March 19, 1896, and by such means were enabled to enter into the land office itself, at nine o'clock, in advance of Hobe and others who had been regularly waiting at the outer door of the government building.

If the rights of Lawrence H. and Hugh P. Strong to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, respectively, of said section, depended, at least as against said Hobe, upon priority of application or entry, alone, the Department would be justified in directing that a hearing be ordered, and that, in the event the evidence adduced at such hearing should show the facts to be as stated in the affidavits on file, their entries should be canceled, as to the land involved, as having been made in fraud of the rights of Hobe. But such proof, if obtained, would not avail Hobe anything, so far as the tracts in controversy are concerned, if, as would appear from the homestead affidavits of Lawrence H. and Hugh P. Strong, respectively, each had made settlement on the land covered by his entry prior to March 19, 1896, when the township plat was filed in the local office.

In his homestead affidavit Lawrence H. Strong swears that he settled, on April 10, 1895, upon the land embraced in his said entry, and has ever since resided thereon. Hugh P. Strong swears that he settled, on March 21, 1891, on the land embraced in his said entry, and has ever since resided thereon. In his argument on appeal Hobe's attorney states that "Hugh P. and Lawrence H. Strong are residents of West Superior, Wisconsin, and never lived a day upon this land

prior to the time of entry, March 19, 1896." Statements of fact made by an attorney in a brief and not supported by the record or by affidavit ought not to be considered. Here no affidavit is submitted to support the statement made and there is nothing in the record which gives the slightest corroboration or support thereto. Furthermore, Hugh P. Strong, by reason of the cancellation of said scrip location as the result of his successful contest against the same (*Strong v. Pet-tijohn et al.*, *supra*), appears to have acquired a preference right to enter the land embraced in said location, which included the said NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ (*McGee et al. v. Ortle*, 14 L. D., 523; and *Hyde et al. v. Warren et al.*, Id. 576). In his homestead application he expressly asserts his claim to a preference right as successful contestant.

If the claims of the Strongs respecting prior settlement and the claim of Hugh P. Strong to a preference right as a successful contestant be correct, there was no occasion for any unseemly haste on the part of the Strongs in filing their applications on March 19, 1896, in advance of Hobe. If these claims were well founded the right of Lawrence H. Strong to the land he claimed, was amply protected as against Hobe by the settlement of the former, and the right of Hugh P. Strong to the land he claimed was likewise protected both by his settlement and his claim to a preference right. In the absence of any evidence calling in question the settlement right claimed by each of the Strongs, or the claim of Hugh P. Strong, to a preference right, the Department would not be justified in directing that a hearing on another matter be had, with its attendant expense, trouble and delay to the entrymen.

An investigation as requested, or a hearing, merely for the purpose of establishing the truth of the allegations of Mr. Hobe as to the clandestine entrance by these entrymen into the government building, whereby they were able to precede him in appearing at the land office, would, as already indicated herein, be unavailing as a means to advance his claim to the tract in controversy, because their claims are not dependent upon such prior entry at the land office.

No charge of dereliction of duty or of culpability is made against the local officers in the matter of the alleged wrongful entrance into the said government building. It seems that the building in which the land office was located was not under the control of the local officers and that their control extended only to the rooms occupied by the land office. In the letter of the register dated June 17, 1896, transmitting said timber land statement and Hobe's appeal and the affidavits there-with filed, that official says:

In reference to the facts alleged in affidavits accompanying said appeal, we have no knowledge other than hearsay. We simply know that Lawrence and Hugh P. Strong were the first applicants for said land on the morning of March 19, 1896, the date upon which the official plat of survey was opened for entry at this office.

As the record now stands, the decision of your office was correct and must be affirmed.

INDIAN LANDS—RESERVATION—RELINQUISHMENT.

WILLIAM CUER.

Under an order directing the reservation of a tract of land for the benefit of an Indian, with a view to his subsequent entry thereof, there is no right conferred upon the Indian by which his relinquishment will serve to release the land from reservation.

An application to enter land, so reserved, confers no right upon the applicant that can be recognized on the removal of the reservation, in the presence of a valid intervening adverse claim.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 5, 1897.* (G. B. G.)

I have considered the case of William Cuer, *ex parte*, on his appeal from your office decision, rejecting his application to make homestead entry, upon the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 3, T. 27, R. 8 E., Wausau land district, Wisconsin.

The land applied for is one of a number of tracts reserved from sale and disposal by departmental order of January 27, 1882, and again reserved by the departmental order of September 29, 1883, on account of selections by one hundred and sixty-seven Winnebago Indians, with a view to homestead entry by said Indians, under section 15 of the act of March 3, 1875 (18 Stat., 420), which is in part as follows—

That any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act.

The tract here in controversy was selected by, for, and on account of, one Daniel Goodvillage, an Indian of said tribe; and on October 4, 1883, your office issued the following order:

REGISTER AND RECEIVER.

Wausau, Wisconsin:

GENTLEMEN: I transmit herewith a list of lands which have been selected by the Winnebago Indians named in said list, for the purpose of making homestead entries thereof, which entries they have been prevented from making in consequence of poverty.

The Honorable Secretary of the Interior, under date of the 29th ultimo, directed that the lands so selected, and embraced in said list, be withheld from sale or disposal, pending the making of the homestead entries referred to.

You will, therefore, note the withdrawal of said tracts upon your records, and permit no entries of the same, other than by the Indians who have selected the same.

Parts of Sec.	Sec.	Tp.	R.	Acres.	Name.	No. of Declaration marked B.
N. $\frac{1}{2}$ SE. $\frac{1}{4}$*	3 *	27 *	8 *	80 *	David Goodvillage.... *	133 *

You will report to this office without delay any conflicts that may be shown by your records with the lands herein described.

Very respectfully,

L. HARRISON,
Acting Commissioner.

On January 18, 1895, the First Assistant Secretary of the Interior addressed a letter to the Commissioner of Indian Affairs, calling attention to certain alleged irregularities in the selection and entering of lands by said Indians, and directed that the matter be thoroughly investigated by the Indian Office, and that such steps be taken as would enable the office to correct the abuses referred to. An investigation was accordingly made by agents sent into the field for that purpose, and on November 4, 1895, Agent Able made his report to the Indian Office, in which he submitted a list of selections for cancellation, among which was the selection of David Goodvillage for the land in controversy. The report and recommendation were approved by the Secretary of the Interior, on January 6, 1896, and on March 25, 1896, the selection was cancelled.

Returning to the matter of the application now under consideration, it appears that said William Cuer made said application to homestead the land, on March 24, 1891, and filed therewith a paper purporting to be the relinquishment of the said David Goodvillage of all right, title and interest in and to the tract described.

The local officers transmitted the papers to your office, which, on April 7, 1891, held that "the identity of the Indian relinquishing with the Indian for whom the tract was reserved" was not fully established, and directed that the selection remain intact, "pending further action by the honorable Secretary of the Interior relative to this and similar reservations."

Without stopping to inquire as to the sufficiency of proof of identification of the Indian, in my view of the law, his so-called relinquishment is not material to the determination of the issue here presented.

It appears that on June 1, 1896, the local officers allowed one Emil Bauman to make homestead entry of the tract, which entry is now intact upon the records. This was after the land had been relieved from reservation, and when it was legally subject to entry.

Cuer took nothing by the relinquishment of Goodvillage, assuming that it was in all respects regular. The Indian had no rights in the tract to relinquish, the land being simply in a state of reservation for his use, should he elect to comply with the law. This he had not done. He had not even, according to the statement of Agent Able, brought himself within the conditions precedent to his right to make a

homestead entry as required by the act of March 3, 1875, he not having abandoned his tribal relations, in the sense of having adopted the habits of civilized people.

Moreover, if he had any right, title, or interest in the land in controversy, he could not relinquish the same without the consent of the government. He was a ward of the nation, and without legal capacity to act in the premises. True, the relinquishment was to the United States, but it was never accepted by the United States, and would not relieve the land from reservation until so accepted.

The land then being in a state of reservation, Cuer acquired no right by virtue of his application to enter the same.

In the case of *Shadbolt v. St. Paul, Minneapolis and Manitoba Ry. Co.* (14 L. D., 613), it was held (syllabus), that

no rights are acquired by the presentation of an application to enter lands that are withdrawn for railroad purposes. On the subsequent restoration of the land, a new application will be necessary to protect the interest of such an applicant.

The uniform ruling of the Department has been that an application to enter land in reservation for any purpose confers no right upon the applicant, and that an appeal from the rejection of such application "does not operate to save or create rights not secured by the application itself." (*Maggie Laird*, 13 L. D., 502).

True, it has been held that applications to enter land in reservation may be allowed, in the event the lands so applied for are restored to settlement and entry, after due investigation; but this is only where the question is one between the applicant and the government, and has never been done so far as I am advised, in the presence of a valid, intervening adverse claim.

In the case at bar the entry of Bauman has intervened, and so far as shown by the papers, seems in all respects regular.

The application of Cuer is accordingly denied.

INDIAN LANDS—ALLOTMENT—UNCOMPAHGRE UTES.

OPINION.

In making allotments to the Uncompahgre Utes as directed by the act of June 7, 1897, the special legislation with respect thereto, as contained in the acts of June 15, 1880, August 15, 1894, and June 7, 1897, must govern, instead of the provisions of the general allotment act, giving controlling effect to the later of said special acts where there is any difference in their provisions.

The Uncompahgres are required to pay for their allotments in Utah one dollar and twenty-five cents per acre out of the proceeds arising from the sale of their reservation in Colorado.

Assistant Attorney-General Van Devanter to the Secretary of the Interior.
(W. M. W.)

A communication addressed to you by the Commissioner of Indian Affairs and relating to the Uncompahgre Ute allotments was referred to me June 21, 1897, for opinion upon the questions therein presented.

The Indian appropriation act of June 7, 1897, contains the following:

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the lands of said Uncompahgre reservation not theretofore allotted in severalty to said Uncompahgre Utes shall, on and after the first day of April, eighteen hundred and ninety-eight, be open for location and entry under all the land laws of the United States; excepting, however, therefrom all lands containing gilsonite, asphalt, elaterite, or other like substances. And the title to all of the said lands containing gilsonite, asphaltum, elaterite, or other like substances is reserved to the United States.

This act does not prescribe the manner in which the allotments are to be made, the age or other qualifications of the allottees, or the character of title or quantity of land which they shall severally receive.

The questions submitted by the Commissioner of Indian Affairs are thus stated:

In the absence of specific provisions in the act of June 7, 1897, it becomes necessary to inquire:

1st. Under what act shall these allotments be made?

2nd. Are the Uncompahgres now required to pay one dollar and twenty-five cents per acre for their allotments?

The act of June 15, 1880 (21 Stat., 199), entitled "An act to accept and ratify the agreement submitted by the confederated bands of Ute Indians in Colorado, for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriations for carrying out the same," ratified an agreement which contained the following stipulations:

The Uncompahgre Utes agree to remove to and settle upon agricultural lands on Grand River, near the mouth of the Gunnison River, in Colorado, if a sufficient quantity of agricultural land shall be found there, if not then upon such other unoccupied agricultural lands as may be found in that vicinity and in the Territory of Utah.

* * * * *

Allotments in severalty of said lands shall be made as follows:

To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section, and to each other person, under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section, with a like quantity of grazing land.

All allotments to be made with the advice of the commission hereinafter provided, upon the selection of the Indians, heads of families selecting for their minor children, and the agents making the allotment for each orphan child.

* * * * *

and referring to the proposed cession of their old reservation in Colorado, and the proposed setting apart of other lands, the agreement further stipulated:

The said chiefs and headmen of the confederated bands of Utes promise to obtain the consent of their people to the cession of the territory of their reservation as above on the following express conditions:

First. That the government of the United States cause the lands so set apart to be properly surveyed and to be divided among the said Indians in severalty in the proportion hereinbefore mentioned, and to issue patents in fee simple to them respectively therefor, so soon as the necessary laws are passed by Congress. The title to be acquired by the Indians shall not be subject to alienation, lease, or incumbrance, either by voluntary conveyance of the grantee or by the judgment, order, or decree of any court, or subject to taxation of any character, but shall be and remain inalienable and not subject to taxation for the period of twenty-five years, and until such time thereafter as the President of the United States may see fit to remove the restriction, which shall be incorporated in the patents when issued, and any contract made prior to the removal of such restriction shall be void.

This agreement was originally submitted at Washington by "certain of the chiefs and headmen" of the Indians and had not been acted upon by the Indians themselves in council or otherwise. Section 1 of the act of 1880 contains several direct amendments to the agreement, not now material, and makes the ratification by Congress subject to the following condition:

. . . . And *provided also*, That three-fourths of the adult male members of said confederated bands shall agree to and sign said agreement, upon presentation of the same to them, in open council

The future disposition by the United States of the ceded reservation in Colorado, the application of proceeds arising from a sale of the lands therein, and payment by the Indians for other lands on which they should be settled, outside of the ceded reservation, were all subjects upon which the original agreement was entirely silent, but "in consideration of the cession of territory to be made by" the Indians, it did make provision for supplying their wants and for setting apart and holding

as a perpetual trust for the said Ute Indians, a sum of money, or its equivalent, in bonds of the United States, which shall be sufficient to produce the sum of fifty thousand dollars per annum, which sum of fifty thousand dollars shall be distributed *per capita* to them annually forever.

Section 2 and the succeeding sections of the ratifying act of 1880, provided for a commission of five persons authorized to superintend the removal and settlement of the Utes, made complete provision for allotting in severalty the lands to which the Indians should be removed, provided for the sale of the lands in the ceded reservation in Colorado, and directed that—

The proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre, which may be ceded to them by the United States, outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians in the proportion hereinbefore stated and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act.

While section 2, and the succeeding sections, do not in express terms amend the agreement, they do, in part, set forth the conditions on which the agreement was ratified by Congress, supply the omissions therein as above shown, and make provision for its execution. In this sense they may be treated as indirectly amending the agreement.

Section 10 of this act is as follows:

If the agreement as amended in this act is not ratified by three-fourths of the adult male Indians of the Ute tribes within four months from the approval of this act the same shall cease to be of effect after that day.

Acceptance and ratification were duly had by the requisite number of Indians in council and within the time named. The instrument of acceptance and ratification expressly recites that "said agreement and the amendments thereto, with the several sections of said act of Congress relating to the same . . . have each and all been submitted to said confederated bands of Ute Indians" and "have been carefully and fully explained and interpreted in open council . . . and considered by said Indians in their own council," and then declares that the "agreement as amended by said act of Congress" is accepted, ratified and confirmed, and that the Ute reservation in Colorado is ceded, sold and conveyed to the United States, excepting such part thereof as might be selected for a part of the Indians to remove to and settle upon.

A sufficient quantity of agricultural land was not found on Grand River near the mouth of Gunnison River, in Colorado, upon which to settle the Uncompahgre Utes, so, with the approval of the Secretary of the Interior, the commission appointed under the act of 1880 removed them to and settled them upon lands in Utah. These lands embrace the present Uncompahgre reservation and some lands "along the Duchene River" within the Uintah reservation. (Report Com. Ind. Affairs 1881, p. XLVI. and 326. Senate Doc. 32, 1st Sess., 55th Cong. 5.) The commission appointed under the act of 1880 was abolished March 1, 1883 (22 Stat., 433, 499) before any allotments in severalty were made.

The 20th section of the act of August 15, 1894 (28 Stat., 286-337, repeated the former provision for the allotment in severalty to the Uncompahgre Indians as follows:

That the President of the United States is hereby authorized and directed to appoint a commission of three persons to allot in severalty to the Uncompahgre Indians within their reservation, in the Territory of Utah, agricultural and grazing lands according to the treaty of eighteen hundred and eighty, as follows:

Allotments in severalty of said lands shall be made as follows: To each head of a family one-quarter of a section, with an additional quantity of grazing land not exceeding one-quarter of a section; to each single person over eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each orphan child under eighteen years of age, one-eighth of a section, with an additional quantity of grazing land not exceeding one-eighth of a section; to each other person under eighteen years of age, born prior to such allotment, one-eighth of a section, with a like quantity of grazing land: *Provided*,

That, with the consent of said commission, any adult Indian may select a less quantity of land, if more desirable on account of location: *And provided*, That the said Indians shall pay one dollar and twenty-five cents per acre for said lands from the fund now in the United States Treasury realized from the sale of their lands in Colorado as provided by their contract with the government. All necessary surveys, if any, to enable said commission to complete the allotments shall be made under the direction of the General Land Office. Said commissioners shall, as soon as practicable after their appointment, report to the Secretary of the Interior what portions of said reservation are unsuited or will not be required for allotments, and thereupon such portions so reported shall, by proclamation, be restored to the public domain and made subject to entry as hereinafter provided.

A commission was appointed pursuant to this act which entered upon the discharge of its duties, but the Indians having objected to the proposed allotments because of the provision requiring payment for the lands allotted, Secretary Smith, on February 4, 1896, issued the following direction to the members of the commission:

The work of the Uncompahgre Indian commission . . . will be discontinued for the present. You are therefore furloughed from date of receipt of this letter.

The work was accordingly discontinued. (Senate Doc. 32, 1st Sess., 55th Cong. 19; Report Com. Ind. Affairs 1896, pp. 96-7.)

Thus we find that there were in full force and effect at the time of the act of June 7, 1897, now under consideration, special statutes (21 Stat., 199; 28 Stat., 286, 337) relating to the Uncompahgre Indians, prescribing the manner in which allotments to them should be made, the age and other qualifications of the allottees and the character of the title and quantity of land which they should severally receive.

The act of February 8, 1887 (24 Stat., 388), with its amendment of February 28, 1891 (26 Stat., 794), is a general statute providing for the allotment of lands in severalty to Indians, and was also in full force and effect on June 7, 1897.

Under which of these statutes are the allotments required by the act of June 7, 1897, to be made? On this question that act is silent. Containing in itself only a direction that these allotments shall be made, and making no provision for executing that direction, it evidently assumes the existence of some other law, applicable to the Uncompahgre Indians and containing adequate provision therefor. Either of the statutes then in force, if it were not for the existence of the other, fully meets this assumption and contains ample provision for the execution of the direction given.

These two statutes are different in their terms and effect and cannot harmoniously and concurrently apply to the same allotments. By which was the rule of allotment for the Uncompahgres prescribed? The act of June 15, *supra*, was special and, with the agreement therein ratified, was submitted to the Indians before they accepted the agreement and its amendments. It may not be material, but no other statutory provision for allotment has been submitted to them. The act of February 8, 1887, *supra*, with its amendment of February 28, 1891, *supra*, is general in character and later in time than the act of 1880,

but the act of August 15, 1894, *supra*, is still later than the general act and directs that the allotments to the Uncompahgre Indians be made according to the special act of 1880.

By the act of 1894 Congress plainly manifested its intention that the allotments to the Uncompahgres should be made under the special act and not under the general statute. This was the state of the law when the act of 1897 was adopted. As before stated, that act is silent on this question. The existence of the special statute, and the fact that it excluded the general statute from application to the Uncompahgre allotments, were known to Congress, and had it been intended that these allotments should be made under the general statute instead of under the special one, such intention would have been plainly expressed in the act then under consideration. The act of 1880, as re-adopted in the act of 1894, contains the latest expression of the legislative will and controls.

The provision requiring the payment of one dollar and twenty-five cents an acre by the Uncompahgres out of the moneys realized from the sale of the reservation in Colorado, is contained in the act of 1880 and repeated in the act of 1894. Attempts to waive or repeal it have been made in Congress, but have not been successful. The pronounced opposition of the Indians thereto and their resistance to allotments by reason thereof, were fully presented in Senate Document 32, 1st Session, 55th Congress, which was before Congress when the act of June 7, 1897, was enacted. Under these circumstances, it is not alone certain that the provision in question has not been repealed, but it is also evident that there was no intention to repeal it.

The letter of the Commissioner of Indian Affairs says: "The act of 1880 provided for allotments of both agricultural and grazing land, while the act of 1897 confines them to *agricultural* land." It is true that the later act speaks only of agricultural land, but it is apparent that the word "agricultural" is here used in the same sense in which it is used in the agreement quoted in the act of 1880, and that as so used it embraces *grazing* land. The agreement, as before shown, contains the following:

The Uncompahgre Utes agree to remove to and settle upon *agricultural* lands on Grand River near the mouth of the Gunnison River in Colorado, if a sufficient quantity of *agricultural* land shall be found there, if not then upon such other unoccupied *agricultural* lands as may be found in that vicinity and in the Territory of Utah.

The White River Utes agree to remove to and settle upon *agricultural* lands on the Uintah reservation in Utah.

Allotments in severalty of *said lands* shall be made as follows:

To each head of a family one-quarter of a section with an additional quantity of *grazing* land not exceeding one-quarter of a section.

To each single person over eighteen years of age one-eighth of a section with an additional quantity of *grazing* land not exceeding one-eighth of a section.

To each orphan child under eighteen years of age one-eighth of a section with an additional quantity of *grazing* land not exceeding one-eighth of a section; and to each other person under eighteen years, now living, or who may be born prior to said allotments, one-eighth of a section with a like quantity of *grazing* land.

The land to which the Uncompahgres were to be removed and upon which they were to settle, is thus described as "agricultural." This land and none other, was to be allotted, and yet the allotments were to be so made as to embrace a "quantity of grazing land." This renders it apparent that the word "agricultural" was used in a sense which includes "grazing." The fact that the grazing of live stock is so closely associated with and so generally accompanies tilling of the soil, makes this use of terms possible and not unreasonable. The broad sense in which the word "agricultural" is sometimes used is illustrated by the fact that lands are sometimes spoken of as agricultural to contradistinguish them from mineral lands.

This act authorizes the allotments to be made "upon the Uncompahgre and Uintah reservations or elsewhere in said State." To the extent only that this embraces lands not included in the acts of 1880 and 1894, it operates as a modification or amendment of those acts.

I am of opinion (1) that the allotments to the Uncompahgres should be made under the acts of 1880, 1894 and 1897, giving controlling force to the later act where there is any difference in their provisions; and (2) that the Uncompahgres are required to pay for their allotments in Utah one dollar and twenty-five cents per acre out of the proceeds arising from the sale of their reservation in Colorado.

Approved, August 5, 1897,

THOS. RYAN,

Acting Secretary.

HOMESTEAD CONTEST—PRIORITY OF SETTLEMENT.

BENJAMIN v. EUDAILY.

A contest against a homestead entry, on the ground of priority of settlement, must fail if it appears that the contestant's alleged acts of settlement were not followed up by the establishment and maintenance of residence.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 5, 1897.* (J. L. McC.)

On October 11, 1893, Daniel Eudaily made homestead entry of the NE. $\frac{1}{4}$ of Sec. 18, T. 27, R. 1 E., Perry land district, O. T.

On October 31, same year, James A. Benjamin filed contest affidavit against Eudaily, alleging prior settlement.

A hearing was had, as the result of which the local officers found in favor of Benjamin, the contestant, and recommended the cancellation of Eudaily's entry.

Eudaily appealed to your office, which, on August 15, 1895, reversed the decision of the local officers, and held Eudaily's entry intact, subject to compliance with law.

Benjamin appealed to the Department, which, on August 8, 1896,

reversed the decision of your office, and directed the cancellation of Eudaily's entry.

Eudaily filed a motion for review, which was entered by departmental letter of January 7, 1897; and arguments have been filed by counsel for both parties.

In view of the allegations contained in said motion, I have caused a careful re-examination of the testimony taken at the hearing to be made.

The departmental decision heretofore rendered found as a fact that Benjamin first went on the land on September 21, 1893; on the 24th he hauled lumber for a house, which he finished October 1, and in which he established residence October 5.

The motion for review earnestly contends (in substance) that Benjamin's acts in connection with the land, prior to the date of Eudaily's entry (October 11, 1893), were not sufficient to constitute such "settlement" as would confer upon him a superior right thereto, and insists that the testimony taken at the hearing shows that such was the fact.

A careful re-examination of the testimony shows the same to have been in substance as follows:

The contestant, Benjamin, testified that he was an unmarried man, and by occupation a farmer; that he first went upon the land in controversy on September 21; hauled lumber for a house on September 24; had a house enclosed about October 1; established residence therein on October 5; and it has been his residence ever since. The house measures eight by ten feet. Started a well which he had dug about two feet deep by October 11 (when Eudaily made entry). The house has a floor—which contestant put in some time in the summer of 1894; prior to that it had only a dirt floor; after finishing the house (in October, 1893), contestant had some lumber left over, with which he put up a bedstead; first put a stove in the house on the 28th of February, 1894; put a window into the house about February 1, 1894; the cracks were not battened up, or only partly so; "in some places you probably could" see through the house from side to side by looking through the cracks; "there was no place left in the roof of the house for a flue or a stove-pipe during the winter of 1893"; doesn't know that he slept in the house a single night during the months of November or December, 1893, or January, 1894; there was no bed in the house until the latter part of February, 1894; no furniture of any kind until that date; in March, 1894, contestant broke about two acres of the land.

A. J. Hunter, witness for contestant, resides on a quarter-section cornering upon the one in controversy; corroborates the testimony heretofore given as to the house and its condition and contents; the house as originally built, proved, when the subdivisional survey was made, to be fifty or sixty yards west of the west line of the tract in controversy, and contestant moved it onto said land; and witness thinks "ten dollars would buy the lumber in the house—twelve dollars at the outside"; witness "never saw any articles of furniture in the house except the

little frame nailed up against the wall" for a bunk; does not know where contestant slept, but he usually came from the town of Blackwell"; does not know that he ever slept a night on the claim, but has "seen him there" a number of times.

W. P. Cumbingham, witness for contestant, lives half a mile north of the tract in controversy; testified to the same improvements heretofore mentioned; does not know whether contestant ever staid a night on the tract in controversy.

Q. Did you ever see Mr. Benjamin on this land?—A. Yes, sir.

Q. What have you seen him doing?—A. Principally gassing when I was over there (page 11).

The testimony shows that Eudaily was a poor man, with a wife and ten children; on September 19, 1893, the Tuesday after the opening of the Territory, two of his boys, for him, plowed several furrows—one (at least) clear around the land—"to show that somebody was there"; at a later period, but before winter set in, a little more plowing was done; nearly all the winter after the entry he was sick, being confined to bed with cancer for eight weeks of the time; he took up his residence on the tract, with his family, on March 2, 1894 (five months and twenty-one days after making entry).

Certain rulings have hitherto been made and adhered to by the Department, in pursuance of the provisions of the homestead law, which it will be important to bear in mind in connection with this case:

(1). As bearing upon Eudaily's entry:—That he had six months from the date of said entry within which to establish actual residence; and the fact that he did not establish residence until near the expiration of that period, and that the improvements made by him within that period were not extensive or expensive, do not militate against his good faith nor call for the cancellation of his entry. (See *Bennett v. Baxley*, 2 L. D., 151; *Baxter v. Cross*, ib., 69; and many cases since.)

(2). As bearing upon Benjamin's claim, based upon his alleged settlement prior to the date of Eudaily's entry:

That in case of an attack upon a homestead entry, based upon alleged priority of settlement, it is incumbent upon the contestant to show that his acts of settlement were followed by the establishment of residence on the land. *North Perry Town-site et al. v. Malone*, syllabus—23 L. D., 87.

In other words, as was said of the contestant in the case of *McInnes v. Cotter* (21 L. D., 97):

The only ground upon which he can stand being that of prior settlement, it became incumbent upon him, in order to present such a case as would lead to the allowance of his entry, to show not only prior settlement (since settlement itself confers no right to any one), but continuous residence.

Furthermore, any person contesting an entry on the ground of settlement prior to such entry, must show, by a preponderance of evidence, a prior valid settlement right.

The burden of proof is upon the contestant to show that his settlement antedates both the entry and settlement of the contestee; and if he fails to thus show such priority the entry must stand. (*Sumner v. Roberts*, syllabus, 23 L. D., 201.)

The testimony, in my opinion, clearly disproves the contestant's claim that he established a *bona fide* residence upon the land prior to October 11, 1893 (the date of Eudaily's entry). Certainly Benjamin has failed to prove, by a preponderance of evidence, "continuous residence" after October 11, 1893.

I therefore concur with and affirm the decision of your office, dated August 12, 1895, dismissing Benjamin's contest, and recall and revoke the departmental decision of August 8, 1896, directing cancellation of Eudaily's entry. Said entry will therefore remain intact, subject to the entryman's future compliance with law.

STATE SELECTIONS—ADVERSE SETTLEMENT CLAIMS.

STATE OF MISSISSIPPI.

The act of June 20, 1894, authorizing the selection of lands for University purposes, restricts such selection to unoccupied and uninhabited lands, and also provides for the issuance of patent for the lands so selected; and it must therefore be held that until patent issues on said selections, the Department retains jurisdiction to inquire into the status of the lands at date of selection with respect to alleged adverse settlement rights.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 9, 1897.* (F. W. C.)

I am in receipt of your office letter of May 26, 1897, relative to list No. 1, of selections made by the governor of the State of Mississippi on May 10, 1895, of certain lands for State University purposes under the act of June 20, 1894 (28 Stat., 94).

The act under which said selections were made provides as follows:

That the governor of the State of Mississippi be, and he is hereby, authorized to select out of the unoccupied and uninhabited lands of the United States within the said State twenty-three thousand and forty acres of land, in legal subdivisions, being a total equivalent to one township, and shall certify the same to the Secretary of the Interior, who shall forthwith, on receipt of said certificate, issue to the State of Mississippi patents for said lands: *Provided*, That the proceeds of said lands, when sold or leased, shall be and forever remain a fund for the use of the University of Mississippi.

Under this act it will be seen, that the State is restricted in its selection to unoccupied and uninhabited lands. In the list under consideration the governor made selection of 23,007.89 acres from lands formerly reserved for naval purposes, and restored, under act of March 2, 1895 (28 Stat., 814), upon certification by the Secretary of the Navy on May 14, 1895, that said lands were no longer needed for the purposes reserved.

In restoring these naval reserve lands, the act of March 2, 1895, *supra*, granted a preference right of entry for six months from the date of the passage of that act, under the provisions of the homestead law, to all *bona fide* settlers who had made improvements and were residing upon any of the agricultural lands in said reservation. The question as to

the right of the State to make selections of these lands was considered in departmental decision of June 3, 1895 (20 L. D., 510), in which it was held that selection might be made of any of the lands restored by said act of March 2, 1895, except those situated on Back Bay near the city of Biloxi, which were to be disposed of under the townsite law.

The act of March 2, 1895, provided for the appraisement of agricultural lands ordered restored, and required the homesteader in making entry of said lands to pay for the same not less than the value determined by the appraisement. Notice of the restoration under this act was, therefore, not given until after the lands had been duly appraised, which appraisal was approved by this Department August 21, 1895, and notice of the restoration was first published September 21, and November 1, 1895, named as the day on which applications to enter said lands would be received.

Following the decision of June 3, 1895, *supra*, your office submitted for approval a list of the lands selected by the governor on May 10, 1895, which list was returned by departmental letter of November 2, 1895, not reported, with instructions to give notice of the State selection and to advise persons claiming adversely to the State that they must present their claims on or before December 12, 1895, after which date the State selection would be acted upon with the view to the approval of the same.

This notice, it appears, was regularly given, under which six claims were presented and the parties all alleged settlement prior to the State's selection on May 10, 1895. The tracts claimed by these parties were eliminated from the selection made by the governor of the State and, thereafter, the list was approved on January 30, 1896, which directed the issue of the patents to the State for the lands covered by said list.

Your office letter now under consideration informs me that although said list was approved on January 30, 1896, patent has never issued thereon, and that a number of applications have been received from the local office at Jackson, Mississippi, from persons desiring to make entry of lands covered by said approved list under the homestead laws, in which the applicants alleged that they settled upon the lands long prior to the selection by the State and have since made the lands settled upon their homes having occupied and cultivated the same.

As the act of June 20, 1894, *supra*, under which the State's selections were made, restricted selection to unoccupied and uninhabited lands, and as patent has not been issued upon the approved list, the matter of these later applications is presented to this Department with request for instructions in the premises.

As the act of 1894 provides for the issue of patent, it must be held that until patent issue, the lands are still within the jurisdiction of this Department, and I have, therefore, to direct that where the allegations of settlement prior to the State's selection are duly corroborated, a hearing shall be ordered, after due notice to the governor of the State,

in order to determine the exact status of the land at the date of the State's selection, and that the matter be thereafter disposed of in the usual manner. Further action upon the company's list will in the meantime be suspended.

RAILROAD GRANT—PRIVATE CLAIM—APPLICATION.

DUNCANSON *v.* DUNCANSON.

A railroad grant does not take effect upon lands that are at the date of the grant embraced within the claimed limits of a Mexican private grant by specific boundaries, though at such time the question of the true location of said boundaries is pending and undetermined.

If a part of the land covered by an application to enter is subject to entry, and a part is not, the application should not be rejected as an entirety, but may be allowed for the land subject to such appropriation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 9, 1897.* (F. W. C.)

E. E. Duncanson has appealed from your office decision of May 4, 1896, dismissing his protest against the allowance of the homestead entry of Edward W. Duncanson, covering lots 1, 2 and 3, Sec. 28, T. 2 S., R. 7 W., S. B. M., Los Angeles land district, California.

To a clear understanding of the grounds upon which the protest is based, a brief recitation of the facts relative to action heretofore taken by this Department upon a prior application tendered by protestant is necessary.

On April 12, 1884, protestant tendered his homestead application covering lots 1, 2 and 3, Sec. 27, and lots 1, 2 and 3, Sec. 28, T. 2 S., R. 7 W., S. B. M. As said application covered part of an odd-numbered section within the primary limits of the grant made by the act of March 3, 1871 (16 Stat., 579), to aid in the construction of the branch line of the Southern Pacific Railroad, the rights under which were held to have attached April 3, 1871, the same was rejected by the local officers and protestant appealed to your office.

By your office decision of September 12, 1884, the action of the local officers rejecting the application was reversed because at the date of the attachment of rights under said railroad grant, said lots in section 27 were within the claimed limits of the Mexican grant Jurupa, as shown by the survey thereof made in 1869, known as the Reynolds survey.

Upon appeal your office decision was reversed by departmental decision of December 1, 1890 (11 L. D., 538), in which it was held that the Reynolds survey of the Jurupa grant was never approved by the surveyor general and was, therefore, not effective as against the railroad grant.

A review of this decision was denied June 23, 1891 (12 L. D., 664).

This appears to have been the last departmental action upon protestant's homestead application.

It is noticed from the proceedings that no heed was given to the fact that protestant applied for other land than that in section 27.

As to the land in section 28, his application should have been accepted, and to this extent his application has never received consideration.

In his protest he alleges that, together with his family, he has continued to make his home upon the land covered by his homestead application since its tender in 1884, being satisfied that his rights would be maintained by the courts; that the railroad company has sued him for possession, and that the suit was, at the date of his protest, pending in the superior court of San Bernardino county.

In this connection he refers to the decision of the United States circuit court in the case of *Southern Pacific v. Brown et al.* (68 Fed. Rep., 333), in which the question as to the effect of Reynolds survey of said Jurupa grant upon the grant for the railroad company was involved, and in which the court held:—

In cases of Mexican grants by specific boundaries, lands claimed by the grantees to be within those boundaries are not public lands, within the operation of a railroad land grant, if, at the date of the latter, the question of the true location of the boundaries of the private grant is pending and undetermined. (Syllabus.)

Said case was carried to the circuit court of appeals, ninth circuit, where the decision of the circuit court was affirmed (75 Fed. Rep. 85).

An examination of these decisions of the courts leads to the conclusion that the decisions of this Department upon protestant's application were erroneous.

It is learned, however, that following the departmental decisions, the lots in section 27 have been patented to the company so that until the outstanding evidence of title has been set aside, protestant's application cannot be reinstated and allowed as to the lots in that section. Edward W. Duncanson applied to make homestead entry of the lots in section 28 on February 17, 1896, the same day the protest under consideration was filed.

If, as he alleges, E. E. Duncanson has continued in the possession and occupation of the land since 1884, I am of opinion that he should be protected in his rights to the land in section 28, under his application presented as before stated, and to this extent he should now be reinstated in his rights.

Hearing should be ordered that opportunity be given E. E. Duncanson to sustain his allegations as to continued occupation and possession of the lands.

I have further to direct that demand be made upon the railroad company, under the provisions of the act of March 3, 1887 (24 Stat., 556), to reconvey said lots 1, 2 and 3, Sec. 27, erroneously patented on account of its grant, and that report be made at proper time as to action taken under said demand.

Your office decision is accordingly modified and the papers returned for action in accordance with directions herein given.

REPAYMENT—DESERT LAND ENTRY.

GEORGE A. STONE.*

Repayment can not be allowed where a desert land entry is properly allowed on the proofs presented, but, on subsequent proceedings, is canceled on account of the non-desert character of the land.

Secretary Bliss to the Commissioner of the General Land Office, June 22, (W. V. D.) 1897.

George A. Stone filed in your office an application bearing date August 18, 1896, for the repayment of the sum of \$160, paid by him on March 13, 1886, upon making desert land entry No. 629 of the whole of section 20, T. 5 S., R. 8 E., Tucson land district, Arizona.

On May 11, 1887, your office on consideration of the report of a special agent, held said entry for cancellation, on the ground that "the land is not desert in character, and not subject to entry under the desert act."

Stone was duly served with notice of said action and was informed that he was allowed sixty days in which to show cause why his entry should be sustained in accordance with circular instructions of July 31, 1885, and May 24, 1886 (4 L. D., pp. 503 and 545), and that if he failed to show cause why his entry should be sustained, the same would be finally canceled. On October 7, 1887, the local officers advised your office that Stone had been duly notified, and had taken no action in the matter. And on November 14, 1887, your office canceled the entry, for the reason stated, and restored the land to the public domain.

On September 17, 1896, your office denied the application for repayment, and Stone has appealed to this Department.

Stone's desert land entry was not "erroneously allowed." The "allowance" is the act of the local officers, and not the act of the entryman. Upon the showing made by Stone and his two witnesses, the land appeared to be desert in character and it became the duty of the local officers to allow his application to enter. Had the entryman sustained the allegations made in his application, the entry would not have been canceled. Unfortunately for him, these allegations were not sustained, and the entry was canceled because the land was not desert in character. Upon the proofs presented the allowance of the entry was correct. The error was not in the "allowance," but in the proofs presented by the entryman. This, then, is not a case where the entry was "erroneously allowed," and it is not one in which the law authorizes me to cause repayment to be made. The application is, therefore, denied.

* Not reported in Vol. 24.

REPAYMENT—DESERT LAND ENTRY—"ERRONEOUSLY ALLOWED."

GEORGE A. STONE (ON REVIEW).

If the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of such character, and the allowance of the entry is procured by such representation, the entry in such case is wrongfully procured, and not "erroneously allowed" within the meaning of the repayment law.

The right to repayment is determined by specific statutory authority, and cannot be recognized except in the cases covered thereby.

The case of *E. C. Masten*, 22 L. D., 337, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 9, 1897. (J. L.)

George A. Stone has filed a motion for review of departmental decision of June 22, 1897, 25 L. D., 110, denying his application for repayment of money paid upon making desert land entry. The facts are stated in the decision sought to be reviewed and will only be referred to so far as may be necessary in considering the errors assigned as reasons for the desired review.

The first error assigned is:

1. The Secretary erred in holding that this entry was not "erroneously allowed" by the local officers, when the field-notes on file show the same growth of mesquite trees upon the tract as shown by the special agent upon whose report the entry was canceled.

This assignment fails for several reasons:

First, the field notes of the survey of this section do not show the same growth of mesquite trees upon the tract as shown by the special agent upon whose report the entry was canceled. The field notes contain simply a general statement of the character of land along the exterior lines of the section;

Second, the field notes were not on file in the local office either in fact or in contemplation of law;

Third, if the field notes had made the showing claimed and had been on file in the local office, the statements therein as to the character of the land, while deemed *prima facie* correct, were not conclusive and were more than overcome by the direct and positive proofs voluntarily produced by the entryman in support of his application to enter the land.

The act of March 3, 1877 (19 Stat., 377), authorized the entry of "desert land" and declared—

That all lands exclusive of *timber lands* and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated.

The sworn statement of Stone says:

That the land above described will not without irrigation produce an agricultural

crop; that there is *no timber* growing upon said land . . . that I became acquainted with said land by personal observation, having been acquainted with it eight years last past.

The affidavit of one of his witnesses contains the following:

That I became acquainted with said land by personal inspection; that I have been acquainted with it for fifteen years last past; that I have frequently passed over it; that my knowledge of said land is such as to enable me to testify understandingly concerning it. . . That it is a fact well known, patent and notorious that it will not in its natural condition, produce any crop. . . That there is *no timber* growing thereon but that it is devoid of timber.

The affidavit of the other witness contains substantially the same statement excepting seven years is given as the extent of his acquaintance with the land.

The circumstances surrounding the cancellation of this entry, and the effect of the cancellation, are described in the brief filed with this motion for review by Harvy Spalding and Sons, counsel for Stone, as follows:

Said agent reported that the tract entered by this applicant, among others, was covered by a growth of mesquite trees to the number of 6,400; each tree sufficiently large to produce one-half cord of wood, and upon this showing the Commissioner held the entry for cancellation as not being desert in character and not subject to entry under the desert land act. The entryman not being able to disprove this statement let the case go by default and the entry was canceled for the reason stated.

We, as well as the United States, are bound by it and it may be taken as finally determined, so far as this case is concerned, that the presence of the mesquite trees upon the land made it insusceptible of entry under the desert land act.

The act of June 16, 1880 (21 Stat., 287), authorizes repayment in cases like this only—

Where . . . desert land entries . . . have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed.

In the decision now sought to be reviewed, it was said:

Stone's desert land entry was not 'erroneously allowed.' The allowance is the act of the local officers and not the act of the entryman. Upon the showing made by Stone and his two witnesses, the land appeared to be desert in character and it became the duty of the local officers, to allow his application to enter. Had the entryman sustained the allegations made in his application, the entry would not have been canceled. Unfortunately for him, these allegations were not sustained and the entry was canceled because the land was not desert in character. Upon the proofs presented the allowance of the entry was correct. The error was not in the allowance, but in the proofs presented by the entryman. This, then, is not a case where the entry was 'erroneously allowed,' and it is not one in which the law authorizes me to cause repayment to be made.

To this it may be added, that it was not error for the local officers to devolve upon the entryman the risk incident to any material falsity in his proofs. It does not lie in his mouth to reproach them for accepting his representations as true and acting thereon.

The second assignment of error is:

2. The Secretary erred in holding that an entry canceled because the land entered is not of the kind contemplated by the law under which the entry is made, is not an entry erroneously allowed within the meaning of the repayment law.

The effect of the decision sought to be reviewed is that where the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of that character, and the allowance of the entry is procured by such representation, the entry is wrongfully procured and is not "erroneously allowed" within the meaning of the repayment law.

The third assignment of error is:

3. The Secretary erred in disregarding the decision of the Department in the repayment case of E. C. Masten, 22 L. D., 337, a case involving exactly the same points as are in this case.

The Masten case was considered in connection with the decision in this case and was disregarded because believed to be wrong. It should have been then, and is now, expressly overruled. Masten claimed, in effect, that his entry had been properly allowed but had been erroneously canceled, and that, therefore, he was entitled to have his purchase money repaid to him. Without referring to the statute and without considering the cases embraced therein, repayment was allowed. It is apparent that the holding was wrong, for the reason that Congress has clothed the Secretary with authority to cause repayment to be made only in certain specified cases and has withheld such authority in all others, of which the Masten case is one.

The motion for review is denied.

HAGGBERG ET AL. *v.* MAHEW.

Motion for review of departmental decision of May 28, 1897, 24 L. D., 489, denied by Acting Secretary Ryan, August 10, 1897.

ADDITIONAL HOMESTEAD ENTRY—SECTION 6, ACT OF MARCH 2, 1889.

NANCY A. STINSON.

The right to make an additional homestead entry under section 6, act of March 2, 1889, extends to cases where the original entry was made either before or after the passage of said act, if the applicant is otherwise within the terms of said section.

The cases of John W. Cooper *et al.*, 15 L. D., 285, and Wallace H. Herrick, 24 L. D., 23, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 10, 1897.* (G. B. G.)

By departmental decision of February 13, 1897 (not reported), the decision of your office, approving the action of the local officers in

rejecting the application of Nancy A. Stinson, to make an additional homestead entry for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 16 N., R. 41 E., Walla Walla land district, Washington, was affirmed.

Said application was made on June 7, 1895, under the sixth section of the act of March 2, 1889 (25 Stat., 854), and was rejected for the reason that the applicant had, on December 24, 1883, filed a pre-emption declaratory statement for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 24, T. 16 N., R. 41 E., same land district, which she had transmuted to a homestead entry on August 13, 1889, and submitted final proof and received final certificate thereon, September 17, 1894.

In passing on the case here it was said in the departmental decision aforesaid that—

The right to make additional homestead entry under section six, act of March 2, 1889, is limited to cases where the original entry was made prior to the passage of said act (citing *John W. Cooper et al.* 15 L. D., 285.)

On April 23, 1897, Mrs. Stinson addressed a communication to the Secretary of the Interior, acknowledging the receipt of a copy of the adverse decision, in which she asks that her case receive the serious attention of the Secretary, but assigning no specific error of law or fact.

Because of the fact that the question involved is one only between the applicant and the government, the irregularities of this paper will be waived, and it will be treated as a motion for review of the case.

Section six of the act of March 2, 1889, *supra*, is as follows:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: *Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity to the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws, etc.

General Land Office circular of March 8, 1889, approved by Mr. Secretary Noble (8 L. D., 314), says in reference to said act—

The fifth and sixth sections both provide that parties who made homestead entries prior to the date of the act of less than one hundred and sixty acres, shall have the right to make an additional entry of a quantity sufficient with the original entry to complete the maximum quantity of one hundred and sixty acres, etc.

In the cases of *John W. Cooper et al.* (15 L. D., 285) and *Wallace H. Herrick* (24 L. D., 23), it is held that the right to make additional homestead entry under section six of said act is limited to cases where the original entry was made prior to the passage of said act, and the

circular cited above is relied on in both cases as authority for such holding.

In my judgment, the doctrine of these cases and of the circular, is unsound. The grouping of sections five and six and treating them as meaning the same thing in this regard, ignores an important difference in the language used and finds no support in the other provisions of the act.

The two sections are essentially unlike in the terms employed and are equally unlike in the purpose expressed. Section five provides—

That any homestead settler *who has heretofore entered* less than one quarter section of land may enter other and additional land lying contiguous to the original entry, which shall not with the land first entered and occupied exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry, etc.

It will be observed that while this section specially limits the right to make an additional entry to one "who has heretofore entered less than one quarter section of land," the benefits of the sixth section are expressly extended to

every person entitled, under the provisions of the homestead laws, to enter a homestead, *who has heretofore* complied with *or who shall hereafter* comply with the conditions of said laws, and *who shall have* made his final proof and received final receipt.

The making of an entry is one of the first and essential "conditions" of the homestead laws, a compliance with the conditions of which, either before or after the date of the act, satisfies the requirements of section six. It seems to me that the language employed plainly expresses the intention of Congress to confer the benefits of this section upon qualified persons who had made, or might thereafter make, a homestead entry of less than one hundred and sixty acres and who comply with the conditions of such laws, make final proof thereunder and receive final receipt therefor. If it be suggested that the words "heretofore or hereafter comply with the conditions of said laws", as here used, refer only to the perfecting of an existing entry, by residence, cultivation, etc., and do not include the making of the entry, the suggestion is answered by the fact that elsewhere in this act where such partial and subsequent compliance is alone referred to, language essentially different from that in section six is employed. Section two, which in *Hertzke v. Heuermond* (25 L. D., 82), is recognized as limited to those who fail to acquire title under entries made before the date of the act, is as follows:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the preemption or homestead laws already initiated.

In the construction of this section, in the case cited, it was held that it referred solely to entries theretofore initiated but included instances where the failure to *perfect* title thereunder either antedated or followed the date of the act. There the ripening of any entry into title by subsequent compliance with the further conditions of the homestead law was designated by appropriate language, plainly indicating an intention to exclude the *making* of the entry and to include only that which is done to *perfect* title thereunder. Even if the making of an entry be not regarded as one of the conditions of the homestead law, within the meaning of this section, there is nothing therein which confines the operation of the section to entries made before the act. The compliance which is therein mentioned may be either prior or subsequent to the act and since this compliance is not confined to any class of entries, it would seem to refer to that which is done to perfect an entry existing at the time of such compliance, without regard to the time when the same was initiated. Those who make entry of less than one hundred and sixty acres after the date of the act are as much within the spirit of this section as those who made such entry prior thereto, and they find no opposition in the letter thereof.

I believe Congress intended to provide a means whereby every homesteader might acquire title to one hundred and sixty acres of land notwithstanding a prior partial exercise of the homestead privilege, and that the right to make an additional entry under section six extends to one whose original entry may have been made either before or after the passage of the act, if he be otherwise within the terms of said section.

The departmental decision of February 13, 1897, in this case, is hereby recalled and revoked and the departmental decisions in the cases of John W. Cooper *et al.* (15 L. D., 285) and Wallace H. Herrick (24 L. D., 23), are overruled. The hesitancy with which I would otherwise overrule prior decisions construing a statute and applying the same as so construed, is obviated here for the reasons: First, I am convinced that the section in question plainly confers a valuable privilege the enjoyment of which is restricted, by the decisions overruled, without any reasonable warrant therefor; second, neither the circular nor the decisions following the same contain any discussion of the question or bear evidence of mature consideration; and third, the changed construction now given to the section will not disturb or unsettle any titles or rights heretofore acquired under the construction then prevailing.

Mrs. Stinson will be permitted to make an additional entry as applied for, if otherwise qualified.

RAILROAD LANDS—SECTION 4, ACT OF MARCH 3, 1887.

KENDRICH ET AL. *v.* PERDIDO LAND CO.

Section 4, act of March 3, 1887, was not intended to protect a speculative purchase made with knowledge of the defect in the title of the railroad company.

The purchasers of the capital stock of a company, that is applying for patent under said section 4, are not purchasers of the land within the meaning of the statute.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 11, 1897. (E. B., JR.)

In the case of Alonzo Kendrick *et al.* *v.* The Perdido Land Company, involving certain lands in the Montgomery, Alabama, land district, the Department, on August 28, 1896 (23 L. D., 288), decided that by entering into an agreement to pro rate its claims under section 8 of the forfeiture act of September 29, 1890 (26 Stat., 496), the company had not waived or exhausted any right to patents for lands applied for by it under the fourth section of the act of March 3, 1887 (24 Stat., 556), but that, being neither a purchaser in good faith nor an assignee in good faith under the said fourth section, it had no right thereunder to the lands applied for, and so dismissed the company's application.

On December 23, 1896 (23 L. D., 529), a motion for review, filed by said company, was denied by the Department on the ground that the motion went only to the question of a purchase in good faith under said fourth section and presented nothing pertinent to that question in this case not heretofore fully considered by the Department. The case comes now again before the Department under an order of January 15, 1897, entertaining what is in effect a petition by said company invoking the supervisory authority of the Secretary.

This petition presents nothing new whatever, being merely a partial reassignment of alleged errors assigned in the said motion for review and fully considered when said motion was denied. Giving the case of Drake *et al.* *v.* Button (14 L. D., 18), again cited, its broadest possible application to this case, it is not a decisive authority upon the question of good faith presented in the case at bar. It could only apply as such authority in any case upon the question of good faith under said fourth section where the situation of all the parties, including the government, in their relations to each other, and the conditions surrounding the grant, were similar throughout to those in the case of Drake *et al.* *v.* Button (*supra*); that is, where the facts in the two cases were essentially similar. A comparison of the facts in the case at bar with those of the case cited shows that they are not essentially similar. The conditions surrounding the respective grants in these cases, and the knowledge of the parties as to their liability to forfeiture, respectively, appear to have been widely dissimilar; and hence the decision that in the one case a party purchased in good faith is not decisive of the question in the other case.

Under said fourth section the question in this case is not as to the good faith of the immediate purchaser from the railroad company or of any intermediate purchaser. The question in this, or in any similar case, is whether the applicant for patent, however near or remote as a purchaser from the railroad company, had such knowledge of the conditions surrounding and attaching to the grant and rendering it liable to forfeiture, as to preclude the view that he purchased in good faith believing that he took a sound title from and through the grantee railroad company, or as stated by the supreme court in *United States v. Winona and St. Peter Railroad Company* (165 U. S., 480), whether

in actual ignorance of any defect in the railroad company's title and in reliance upon the action of the government in the apparent transfer of title by certification or patent, he has made an honest purchase of the lands.

The decision in the case now sought to be re-opened and reconsidered held, in effect, that the Perdido Company had such knowledge and did not therefore make an honest purchase in ignorance of the defect in the railroad company's (the Mobile and Girard Company's) title, and hence was not a purchaser in good faith in the meaning of said fourth section. A very careful re-examination and reconsideration of the evidence in the case convince me that that conclusion is correct.

The applicant company, it seems, was organized in 1869, for speculative purposes under the direction and control of one W. J. Van Kirk, mentioned in said decision. The main if not the exclusive purpose of the organization of the company was to capitalize and manipulate the said lands and better defend title claimed thereto as a purchaser from the railroad company. Van Kirk was then the beneficial owner of these lands, subject to the rights of the United States therein, and was still such owner when in January, 1890, the lands were conveyed to the Perdido Company without consideration by A. C. Blount, Jr., who held them previously in trust for Van Kirk. As late as January, 1894, Van Kirk still owned nine-tenths of the stock of the Perdido Company. The consideration to the railroad company for these lands, which moved, in effect, from Van Kirk through Josiah V. Thompson, who virtually only purchased to accommodate Van Kirk, averaged a little more than five cents per acre, according to the deeds from the company to Thompson. I am of opinion that it was not intended by the enactment of said fourth section to protect a purely speculative purchase, such as is here disclosed, at a merely nominal price and with knowledge of the defect in the railroad company's title, and to give full legal title by the issue of patent to a party, who otherwise could have no title, and thus, furthermore, lay the foundation for a demand upon the railroad company, to be enforced by suit if necessary, for payment to the government, on account of the sale of these lands, of an amount equal to the statutory price of similar public lands, as provided and required by said section.

The affidavits of various persons, filed with the motion for review and

considered when that motion was denied, and now made the basis, in large part, of this petition, and tending to show that since filing its application for patent, June 29, 1893, much, if not all the stock of said Perdido Company, which was then owned by W. J. Van Kirk, has been sold to these persons, who allege that they purchased such stock in good faith, furnish no ground for modifying, in any way, the decision of August 28, 1896. Purchasers of the capital stock of the Perdido Land Company are not purchasers of the land in question within the meaning of the statute, and they are not parties to this proceeding and cannot become such. The question of their good faith in the alleged purchase of the stock cannot become an issue in this case, and if it could, it would not be determined upon *ex parte* affidavits.

I find nothing in the present petition to warrant me to disturb that decision. The petition is accordingly denied.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION OF RIGHT.

HENRY WALKER.

An application for the certification of a soldier's additional homestead right, made on behalf of a purchaser of said right, cannot be allowed where the additional right of the soldier has been exercised, through an entry made in the name of the soldier's widow, such entry being allowed by the Land Department without notice of the prior sale of the additional right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 11, 1897.* (A. B. P.)

By your office letters of February 13, 1897, certain facts are set forth relative to the right to make soldier's additional homestead entry in the name of one Henry Walker, as bearing upon the question presented by the application of one M. J. Wine for certification of such right for his benefit as assignee of Walker, and instructions are asked as to whether, in view of the facts stated, there exists any valid objection to the issuance of such certificate as applied for.

The facts thus set forth are as follows:

On December 3, 1866, Henry Walker made H. E. 155, Little Rock, Arkansas, series, for the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 13, T. 1 N., R. 13 W., containing forty acres, on which F. C. 303 was issued November 17, 1874, and patent on November 30, 1878. The witnesses in the final proof in said case allege "that Henry Walker is the identical person who was known by the name of Henry Rankin in the U. S. Army."

On November 23, 1874, soldier's additional homestead entry, No. 515, F. C. 474, was made at Des Moines, Iowa, under Sec. 2306 R. S., in Walker's name, for the N. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 2, T. 67 N., R. 19 W. In his affidavit of military service, filed in said case, Walker alleged that he served in Co. A., 64th U. S. Col. Inf. Vols.; that, when he was a slave, his first master's name was Rankin and his last master's name was Walker, and that after coming out of the army he took the name of Walker. As the military service claimed could not be verified by the records of the War Department, Messrs. Heylman and Kane, upon being advised thereof, filed, by

their letter of April 5, 1879, another affidavit executed by Walker on March 5, 1879 (and in which M. J. Wine is a witness to his signature), in which he alleged service in Co. E, 64th U. S. Col'd Inf., and Co. D, 56th Reg. U. S. Col'd Inf. Vols. This claim of military service was not verified by the records of the War Department and Messrs. Heylman and Kane were so advised by letter of July 26, 1879, and that unless better evidence of Walker's military service could be furnished his entry would be canceled as illegal. No further evidence having been filed, the Des Moines entry was cancelled by letter "C" of November 27, 1885, for that reason, and also, apparently, because of a prior adverse claim.

In the meantime Messrs. Heylman and Kane, on March 15, 1883, filed the application for a certificate of additional right in Walker's name. The application was rejected by letter "C" of June 29, 1883, because Walker's claim of service could not be verified, and because of the pendency of his additional homestead entry, made at Des Moines, Iowa, and the papers were returned to the attorneys. Nothing further appears to have been done in regard to said application, until the filing of Wine's motion, on July 21, 1896, through his attorney, Mr. Hazelton. It is stated in the said motion by Mr. Hazelton that the attorneys of record have not, since March 15, 1883, been advised of any action on the application for Walker's certificate of right.

In both the letter of March 15, 1883, from Messrs. Heylman and Kane, and the letter of July 21, 1896, from Mr. Hazelton, the application for a certificate of right is said to have been *re-filed* March 15, 1883, and that adverse action had formerly been taken thereon. I have been unable to find any record of a former application, and it is presumed that the former adverse action referred to is that taken against Walker's Des Moines entry.

With his letter of July 21, 1896, Mr. Hazelton filed two powers of attorney, one to locate and the other to sell the land to which Walker was entitled, under his additional right, both executed in favor of M. J. Wine, on the same date (March 5, 1879), and before the same officer as the affidavit heretofore mentioned as having been filed in support of Walker's Des Moines entry.

On August 31, 1886, Violet Walker, widow of Henry Walker, alias Henry Rankin, made an additional homestead entry at Las Cruces, N. M., H. E. 1353, F. C. 473, for 153.79 acres. Said entry seems to have been first examined in 1891, and was held to be confirmed by the proviso to section 7, act of March 3, 1891 (26 Stat., 1095), as more than two years had elapsed after the issuance of the final receipt, and it was accordingly passed to patent. In this case the military service of Walker was alleged to have been performed in Co. A, 69th Regt. U. S. Col. Troops, under the name of Henry Rankin, and it was verified by the records of the War Department. In affidavits filed with said case it is alleged that Walker died on August 2, 1879.

It appears from the foregoing recital that on March 5, 1879, Walker sold his right to make soldiers' additional homestead entry to one M. J. Wine, by means of two powers of attorney, one to locate and the other to sell the land located upon, and to appropriate the proceeds to his own use, the powers being coupled with an interest and therefore irrevocable. Previous to this time, to wit, on November 23, 1874, it appears that the additional right in question had been asserted in Walker's name and an entry made at Des Moines, Iowa, but this entry was canceled November 27, 1885, for want of proper proof of military service.

In the meantime, to wit, on February 13, 1883, by departmental circular of that date, the practice of issuing certificates of additional right to soldiers, which had theretofore prevailed under circular of May 17, 1877, was discontinued, but with the proviso that the new

rules would not be deemed to apply to cases where the additional right had already been certified, nor to cases then pending, or which might be filed prior to March 16, 1883.

On March 15, 1883, presumably in pursuance of the proviso to said circular of February 13, 1883, application for a certificate of additional right, in Walker's name, was filed by attorneys claiming to represent him. This application was presented notwithstanding the pendency or the additional homestead entry in Walker's name at Des Moines, Iowa. The application was rejected June 29, 1883, because of lack of proof of military service, and because of the then existing Des Moines entry, either of which was a sufficient reason for the action taken.

It is claimed, however, that Walker's attorneys of record were never notified of the rejection of his application of March 15, 1883, and that in view thereof, and of the further fact that the application was filed within the time limited by the proviso in the circular of February 13, 1883, the present application by the assignee, M. J. Wine, should not be adjudged under said circular of February 13, 1883, but should be controlled by the prior circular of May 17, 1877, which provided for, or rather allowed, the certification of the additional right.

In the view I take of this case, it is not deemed material whether this contention be held as sustained by the facts or not. The primary and more important question is whether the right of additional entry which originally belonged to Walker, has not been already exhausted by the additional homestead entry made by his widow in 1886, as shown. If such right was exhausted by the widow through the entry made by her in New Mexico, it follows that there now remains no additional right on account of said Walker to be certified to anybody, and in that event it would matter not under which of the circulars referred to the merits of the application are to be adjudicated.

It will be conceded, upon the showing made, and in view of the authority of the recent case of *Webster v. Luther et al.* (163 U. S., 331), that M. J. Wine, the present applicant, did, on March 5, 1879, purchase from Walker his right of additional entry, and that he thereby became the legal assignee of said right.

It may be further conceded that if Wine had made known to the government the fact of his said purchase, and had asserted his rights against the government as such purchaser and assignee, before the entry by Walker's widow had been allowed, as stated, it could not now be held that said entry, made by the widow, in any way affected the rights acquired by him under his said purchase and assignment. This, however, he did not do, but withheld from the government the fact of his purchase until July 21, 1896 (the date of the present application), nearly ten years after the Land Department, without any knowledge of his said purchase, had allowed the exercise of Walker's additional right of entry by his widow, he having died in the meantime. The government had no notice whatever of the claim of Wine

as assignee, when the widow's entry, based upon the very right he now asserts, as such assignee, was allowed; and to hold that he is nevertheless entitled to make another entry, based upon the same right, would be simply to allow a double satisfaction of a single additional homestead right.

It was Wine's duty, as well as his privilege, to have notified the government of his purchase, and to have asserted his claim thereunder immediately, or at any rate, before the exercise of the right he purchased has been allowed to another; and not having done so, I know of no principle of law or of equity which demands the recognition of his present claim. The government is under no obligation to him, nor is he in a position to complain.

True, it may be said that if, after his said purchase of the right, he had asserted his claim as assignee thereof, the Department, at that time, would not have recognized it, because the right was then held not to be assignable; but this, for obvious reasons, can not operate to give merit to his present application, or to place his claim on such a basis as to demand recognition upon any principle of equity or justice. It serves rather to explain the withholding by him of the fact of his purchase. Whatever the motive may have been, it will not justify the Department in recognizing his claim under said purchase, first asserted more than sixteen years thereafter, and in the face of the fact that another party has obtained, in the meantime, the full benefit of the right.

The Department cannot, in any case where it appears that additional entry has already been allowed for lands to which the soldier was entitled, thereafter recognize any claim by a purchaser from the soldier of his additional right, who purchased prior to the allowance of the entry, but of which purchase the Land Department had no notice when the entry was made. In all such cases it must be held that the entry once allowed, in the name of the soldier, his widow, or guardian for his minor children, in the absence of notice of a prior sale or purchase, exhausts the right. This is but simple justice, and it is the only way the government can be protected.

For the reasons stated the application of Wine must be, and the same is hereby, rejected.

PRACTICE—SERVICE OF NOTICE—APPEARANCE.

JENKINS *v.* NORTHERN PACIFIC R. R. CO.

A general appearance is a waiver of all defects or irregularities, if any exist, of notice, process, or service, necessary to confer jurisdiction.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 13, 1897.* (E. B., Jr.)

Your office decision of February 18, 1896, in the case of David P. Jenkins *v.* The Northern Pacific Railroad Company, involving the NW. $\frac{1}{4}$ of Sec. 19, T. 30 N., R. 40 E., W. M., Spokane, Washington,

land district, vacated and set aside the decision of the local office in favor of contestant, and remanded the case for hearing *de novo*, on the ground that the local office was without jurisdiction of the case by reason of defective service of notice of the hearing on said company. From this decision contestant appeals, contending that said company duly appeared on October 18, 1895, the day originally set for the hearing, and at other times, and that by appearing the company waived all defects in the service of notice.

It appears that the land involved is included in the company's selection list No. 6 for indemnity lands under its grant; that on June 3, 1895, Jenkins filed a protest against the selection by the company of said land, alleging that in June, 1892, he duly located the Hamburg and Mary Hill mining claims—the former lying wholly and the latter partly within said land—and that the land embraced in these claims was more valuable for its deposits of gold and silver than for agricultural purposes; and that pursuant to direction by your office, dated July 29, 1895, a hearing was duly ordered by the local office to commence there October 18, 1895. Notice of this hearing was sent by registered mail to the attorney of the company at St. Paul, Minnesota, August 17, 1895, and post office registry return receipt therefor, dated four days later, bears the signature, apparently, of F. M. Dudley, the company's attorney. Whether this was sufficient notice to give jurisdiction under the Rules of Practice it will not be necessary to determine, because jurisdiction in this case is not dependent upon such notice.

In considering the case the Department on June 22, 1897, stated and directed as follows:

The record now before me of the proceedings had before the hearing is not complete, and in order to complete the same, so that the character of the appearance may be clearly shown, you will direct the local officers to certify all proceedings had in the matter of the continuances in this case, as shown by their contest docket, or other records of their office, and also to forward all agreements for continuances, if the same were reduced to writing and are on file in their office.

In response to that direction the local officers under date July 7, 1897, report:

The records show that the case was called at 10 A. M. on Oct. 18, 1895, all the parties being present and a continuance was had by the consent of the attorney for the Northern Pacific R. R. Company and Mr. Jenkins, to October 23, 1895, at 10 o'clock A. M.

On October 23, 1895, a stipulation for a continuance was filed, signed by the protestant and the attorney of the N. P. R. R. Company, and the case was continued to November 22, 1895, at which time the protestant appeared, but the railroad company failed to appear. On November 22, 1895, the protestant desired a continuance until Nov. 23, 1895; and the continuance was granted. The stipulation for the continuance from Oct. 23, 1895, to Nov. 22, 1895, was forwarded with the papers in the case, and the reason that a continuance was asked for from Nov. 22, to Nov. 23, was that it was feared that there was some misunderstanding with the attorney for the Northern Pacific Railroad Company, it having been first understood that the continuance from October 23, should be to November 23, instead of November 22, and to make sure that there was no misunderstanding the case was continued at the suggestion of the

protestant to Nov. 23, at which time the protestant introduced his testimony and there was no testimony on behalf of the Northern Pacific Railroad Company. The testimony was taken on November 23, 1895, and a decision rendered on November 26, 1895.

The "stipulation," so-called in the report of the local office, is marked exhibit "B", and was filed October 23, 1895. It is as follows:

UNITED STATES LAND OFFICE, SPOKANE LAND DISTRICT.

DAVID P. JENKINS }
v.
N. P. R. R. Co. }

The land involved being NW. $\frac{1}{4}$ Sec. 19, Tp. 32 N., R. 40 E., W. M., Wash.

It is hereby agreed between the undersigned David P. Jenkins and N. P. R. R. Co., by Tom Cooney, that the hearing in the above entitled case, set for Oct. 23rd, 1895, before the register and receiver of this office, be postponed until Nov. 23rd, 1895.

(Signed)

CONTESTANT.

TOM COONEY,

Atty. for N. P. Land Dept., Contestee.

I hereby agree that the case between David P. Jenkins and the N. P. R. R. Co., based on a protest filed by me in the Spokane Falls, Wash. Land Office, be continued to Nov. 22, 1895, the said case having first been set for Oct. 18, '95, and a continuance granted until Oct. 23, '95, this being the second continuance agreed upon, the hearing to be on Nov. 22, 1895.

(Signed)

D. P. JENKINS.

The figures "32", used above as indicating the township in which the land is situated, are evidently a clerical error, it clearly appearing that the land first above described in township 30 N., includes the land in controversy between these parties.

It thus appears that the so-called "stipulation" consists of the draft of a proposed agreement signed by attorney Cooney for the company, only, for a continuance to November 23, 1895, and a counter proposition signed by Jenkins, only, for a continuance to November 22, 1895. In effect the paper marked exhibit "B" contains two propositions for continuances, the first by the company through its attorney, Cooney, and the second by Jenkins. But the minds of the parties did not meet on either of these propositions, and hence neither proposition became an agreement or a stipulation for a continuance. Whether attorney Cooney's proposition amounted to a motion for a continuance would depend upon the circumstances under which it was filed. These are not shown by the record.

The case went to trial on November 23, 1895, as stated in the report of the local office, the company making default. The decision of the local office was in favor of Jenkins, that office holding that the land was mineral in character and therefore excepted from the grant to the company. No appeal was taken from that decision, but the record having been transmitted to your office, upon considering the case your office decided as hereinbefore indicated.

I think it sufficiently appears from the record before me that the company appeared generally in the case on the day set for the hearing,

October 18, 1895. Whether it appeared subsequently is therefore immaterial. That a general appearance by the company waived all defects or irregularities, if any, of notice, process, or service, necessary to obtain jurisdiction over it, see Am. and Eng. Encyc. of Law, Vol. 1, p. 183; and *Creighton v. Kerr*, 8 Wall., 8; *Hill v. Mendenhall*, 21 Wall., 434; *Turner v. Johnson*, 12 L. D., 263; and *Clark et al. v. Ervin*, 16 L. D., 122.

Even if the company could have disregarded the notice sent by registered mail, it did not elect to do so, but appeared voluntarily, and thereby gave the local office full jurisdiction over it in the case. Your office decision is accordingly reversed. Your office will further consider the case and make such disposition thereof as the law and the evidence may seem to require.

PRATSCH ET AL. *v.* DOBBINS ET AL.

The application of Pratsch to intervene at the hearing ordered by the departmental decision of May 11, 1897, 24 L. D., 426, and be heard on his amended settlement claim, allowed by Acting Secretary Ryan August 13, 1897.

PRACTICE—HEARING—PROTEST.

FOSTER *v.* REES.

An application for a hearing on a protest should not be granted if the allegations therein contained do not make out a *prima facie* case calling for the cancellation of the entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 16, 1897.* (H. G.)

This is an appeal from your office decision of November 5, 1896, denying a hearing requested in the protest of Edwin D. Foster against the commuted homestead entry of William B. Rees, for the NE. $\frac{1}{4}$ of Sec. 25, T. 19 N., R. 2 E., Guthrie, Oklahoma, land district.

On November 23, 1894, said William B. Rees made homestead entry for said tract and on June 6, 1896, submitted his commutation final proof. Two days later, the cash entry certificate for the tract was issued to him.

On June 11, 1896, said Edwin D. Foster filed his affidavit protesting against said entry and applying to contest the same. The allegations which are based wholly on information and belief, in substance are, that about three weeks before making his final proof, Rees, the entryman, sold and agreed in writing to convey the land to one William T. Dalton as soon as the final receipt for the tract was issued to Rees; that the consideration for the sale was \$2400.00, made up of money and town property and probably also of certain merchandise, (although

in this respect the affidavit is not clear); that four hundred and fifteen dollars were deposited, of which "over" two hundred dollars was to be paid to Rees upon his obtaining the final receipt; that when this receipt was issued to him, Rees demanded of Dalton a fulfillment of the contract and expressed his own readiness to comply with it; that Dalton, after taking legal advice, refused to perform his part of the contract until Rees received patent for the land; that the following day the contract was modified so that Rees executed a deed for the tract and Dalton executed one for the town property, and these deeds were placed in escrow with the contract; that Rees was then paid a "certain" sum of money and the entire contract was to be fulfilled on receipt of the patent for the land, and possession of the property and merchandise were then also to be exchanged; that protestant had no knowledge of these matters until two days after the final receipt was issued, when he proceeded to enter his protest.

He prays that an inquiry be ordered into the facts set forth in his protest, asks that the final receipt and the homestead entry be declared fraudulent and be set aside, and that he may be allowed the preference right of entry to the tract.

In support of this affidavit, wholly based upon information and belief, is the affidavit of William H. Dysart, which, briefly stated, is to the effect that about three weeks before the final proof was made by Rees, the latter stated to the affiant that he, Rees, would soon have plenty of money; that he had sold his claim, meaning as affiant understood, his homestead claim; that afterwards and two days after the final receipt was issued, affiant heard considerable talk about some misunderstanding between Rees and Dalton in regard to the sale of the homestead of the former to the latter; that on that day affiant had a conversation with Rees, in which Rees informed him that he had sold and agreed to make a deed by written contract made a month previous; that Dalton had deposited \$415.00 as a forfeit on the sale, and that Rees had withdrawn from that deposit \$215.00 to pay for the land and the expenses of the final proof; that Dalton wanted Rees to do something affiant "does not now remember just what," which Rees would not do, and that there were other differences between Dalton and Rees. Dysart further states in his affidavit that it was a notorious fact in the vicinity of the tract that Rees had sold his homestead before proving up on it.

Foster filed in the local office on June 22, 1896, a supplemental protest made on his information and belief, which was forwarded to your office, in substance stating that Rees and Dalton on being informed that it might require from six months to one year to secure a patent for the land, in order to provide for "intervening contingencies" agreed that Rees, in addition to the deeds placed in escrow by him, should, with his wife, execute a mortgage upon the land for six hundred dollars, and this agreement was carried out, the mortgage being given to

secure the payment of said sum on June 10, 1897, one year after its date, "according to the conditions on back of promissory note," and Foster states, on information and belief, that these conditions are that Rees shall comply with the terms of the contract as originally made between him and Dalton. This additional protest further states that the parties actually knowing the facts detailed in both of the protests will not disclose them until forced to do so when appearing as witnesses at the hearing of the contest. A certified copy of the mortgage referred to in the supplemental protest is attached to that protest as an exhibit.

Upon this showing, the decision of your office is:

1. The exhibit (the mortgage) tends to show a transaction relative to title to the land since commutation. The entryman is not restrained from selling or mortgaging the land since he made final entry;
2. The allegations of the plaintiff tending to show that the entry was made for fraudulent or speculative purposes are not based upon actual knowledge, neither are they properly corroborated;
3. That the charges are not sufficient to warrant an investigation; therefore the hearing is denied.

Foster appeals.

A motion is made in behalf of Rees to dismiss the appeal on various grounds, and following this is a supplemental motion for the same purpose, one of the grounds thereof being that there is no corroborating affidavit to the protest, as W. H. Dysart, who made the affidavit supporting the protest, filed his application to withdraw such affidavit, and such application is supported by an affidavit to the effect that his former affidavit is false and untrue.

In his second affidavit, Dysart states: "That since the making of said affidavit and the filing of said protest, the affiant has made diligent inquiry as to the truth or falsity of the contents of said affidavit and believes the same to be false in spirit, truth and fact." This second affidavit was made February 20, 1897, and after the decision of your office denying a hearing.

It has been held by this Department that after a hearing has been directed on the charge set forth in an affidavit of contest, the subsequent retraction of the statements in the corroborating affidavit does not warrant the General Land Office in revoking the order for the hearing under departmental direction. *Lowenstein v. Orne* (23 L. D., 285).

But in the proceeding at bar, the revocation of the corroborative affidavit was made while the application for a hearing was still pending, and it directly and in strong terms disaffirms the truth of the former affidavit, and states that it is made after diligent inquiry as to the truth or falsity thereof. While there is no explicit retraction, in terms, of the statements imputed to Rees, the entryman, in regard to his selling or agreeing to sell the tract held by him under his home-

stead entry, prior to making his final proof, the inference can not be otherwise than that such a retraction is made, as the affiant asks that his former affidavit containing such admission of the entryman be withdrawn. He states that he believes the contents of the corroborating affidavit "to be false in spirit, truth and fact," and it would seem that this sweeping language cannot be otherwise construed than as a positive denial of the truth of all of his former statements.

It is probable that upon investigation, the witness became convinced that not only were the statements imputed by him to Rees untrue as a matter of fact, but that they were misunderstood by the affiant or were explained to his satisfaction, and that the generally accepted belief of the community where the land lies that Rees had sold his homestead before making final proof therefor, was based either upon mere rumor or groundless conjecture. At any rate, the retraction must be considered as a positive denial of the matters testified to in the corroborative affidavit, and would effectually neutralize and dispose of the statements of the former affidavit, if the affiant were called as a witness at the hearing.

It follows, therefore, that with this affidavit withdrawn the protest and supplemental protest based entirely upon information and belief are insufficient to secure an investigation of the charges therein set forth. There must be a *prima facie* showing of fact made in the affidavit for contest or in the supporting or corroborative affidavit, or the hearing may properly be denied. While the affidavit for contest, if made upon facts within the knowledge of the contestant, may be corroborated by witnesses who testify on information and belief, yet if the contestant's allegations rest upon information and belief, they should be corroborated by witnesses whose statements are based upon personal knowledge of the facts. *Buckley v. Massey* (16 L. D., 391).

As it now appears that the statements of the affidavit supporting the protest are admitted to be false, nothing is left to be considered but the original and supplemental protests, which are based solely upon hearsay, and upon such a showing a hearing will not be ordered by the Department in violation of its rules of practice and its repeated decisions.

But a review of the matters passed upon by your office, aside from any consideration of this retracting affidavit, which was filed thereafter, leads to the conclusion that the decision of your office appealed from is correct. The original and supplemental protests and the supporting affidavit of Dysart are not sufficient to warrant an investigation; neither is the affidavit of Dysart, corroborative of the charge made on information and belief in the protests.

Where final entry has been made, the power to grant a hearing rests in the discretion of your office, subject to appeal therefrom, it is true, but even then the judgment will not be disturbed unless an abuse of discretion is affirmatively made to appear. (*Myers v. Massey* (22 L. D., 159) and *Gray v. Whitehouse* (15 id., 352, 354).

In refusing the hearing applied for in this matter, it does not affirmatively appear that there was an abuse of discretion, but, on the contrary, it appears that the allegations of the protest were not made upon positive knowledge, and that the supporting affidavit does not assist in making a *prima facie* showing based upon sworn facts.

The hearing is denied and the protests are dismissed.

HOMESTEAD ENTRY—MARRIED WOMAN.

BUSH *v.* LEONARD.

A married woman who is not entitled to acquire a domicile of her own, separate and apart from that of her husband, is not qualified to exercise the homestead right.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 19, 1897. (J. L. McC.)

On October 24, 1893, Charles Leonard made homestead entry for the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and lot 1, of Sec. 20, T. 20 N., R. 10 E., Ferry land district, Oklahoma Territory.

On November 24, 1893, Demaris Bush presented her application to make homestead entry for lot 1, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Sec. 20, and lot 7 in Sec. 21, said township and range.

Her application was rejected because of the prior entry of Leonard. Thereupon she filed affidavit of contest, alleging prior settlement; and on this allegation the case went to trial on June 7, 1895.

On June 25, the local officers rendered decision, finding (1) that the contestant was a married woman, and therefore not qualified to make entry; and (2) that both parties were disqualified because of having entered the Cherokee Outlet, on the day of the opening, from the Creek country on the southern boundary of said Outlet. From their decision both parties appealed to your office.

Your office, by decision of December 18, 1895, held that the parties were not disqualified because of having entered from the Creek country. Furthermore, "that Mr. Bush did not abandon her, but that, on the other hand, she abandoned him"—and therefore your office dismissed the contest.

From this decision Mrs. Bush has appealed to the Department.

Since the date of the appeal, Mr. Leonard has filed a relinquishment of his homestead entry, and so gone out of the case.

Mrs. Bush has filed a relinquishment of all her entry except lot 7 in Sec. 21.

This leaves the question solely between Mrs. Bush and the government as to whether she is qualified to enter said lot 7.

Your office was correct in holding that the fact of her having made the run from the Creek country did not disqualify her from acquiring land in the territory.

The facts relative to the alleged abandonment are set forth in the decision appealed from as follows:

The evidence shows that she was married to Mr. Bush in Indiana, in April of 1882. They resided in Indiana from the date of said marriage up to the first day of March, 1892. They had in Indiana a permanent home comfortably furnished, and Mr. Bush owned a farm of 139 acres. On the said first day of March, 1892, Mrs. Bush being then, as she states, an invalid, they went to Kansas traveling for her health. They staid in Kansas, at the home of Mrs. Bush's brother, to the 27th day of the same month, when they went with the said brother, who removed at that time to the Indian Territory. They continued to stay with him until the 25th day of July, 1892, when Mr. Bush returned to Indiana. He had frequently said to his wife, "We had better go home;" and she had as often replied, "I am not ready to go yet, for my health is better here than in Indiana." She declined to return with him. Mrs. Bush remained with her brother until September 16, 1893, when she made settlement upon the land in dispute. About October 4, 1893, she returned to the vicinity of the home in Indiana; for the purpose, as she states, of securing means for making improvements on the land. She remained there about five weeks, and when she returned Mr. Bush came with her. She had met him there, and their relations had been friendly. In addition to Mr. Bush, a son, a nephew, and several children, and perhaps one or two other persons, went with her to the Indian Territory. They went as one party, and rode in the same car. On their arrival in Oklahoma, Mr. Bush first went with his wife to the house of her brother; from there he went to the claim. It appears that he was on the claim a part of the time, and at the house of the said brother a portion of the time. He seems to have occupied the relation as a friend or passing acquaintance of Mrs. Bush. He was at her tent, and ate and slept there when he cared to. She neither invited him to come, nor did she tell him to go away; but she said she always treated him well. The length of time which he remained is not definitely stated; but it was not perhaps more than three weeks when he went again to Indiana.

The appeal alleges that your office decision was erroneous, (1) because it "was contrary to law and the rules and regulations of the Department of the Interior;" (2) it "was contrary to the evidence adduced in the trial." These two allegations are not sufficiently specific to call for consideration.

In view of Leonard's relinquishment of his entry, the several allegations to the effect that your office erred in not holding his entry for cancellation are immaterial, and need not be considered.

Two of the allegations specify errors in the findings of facts by your office, as follows:

6. In holding that the husband of Mrs. Bush was ready to receive her in his home in Indiana at any time she desired to go there;

7. In holding that Mrs. Bush declined and refused to live with her husband.

Mrs. Bush's testimony on this point was as follows:

Q. He asked you to go back?—A. No, sir—not when he started.

Q. Didn't he before he started?—A. He said *we* had better go back.

Q. He tried to induce you to go back?—A. He said we had better go back—that he was going back.

Q. You had refused to go?—A. I had told him I didn't want to go.

Q. You had refused to go?—A. Yes, sir, I told him I didn't think I would go.

This was drawn from Mrs. Bush reluctantly, while she was attempting to show that her husband had deserted her; but I think it sustains the

statement made (in substance) by your office, that she declined and refused to live with her husband, and that his home in Indiana was ready to receive her at any time. If he was not ready to receive her there it was strange that he should have repeatedly urged her to accompany him thither.

The other allegations of error are as follows:

3d. The said decision erred in not holding that the contestant Demaris Bush was an abandoned wife and qualified to make homestead entry.

4th. The Hon. Commissioner erred in holding that the husband has the right to fix the place of domicile.

7th. The Hon. Commissioner erred in holding that Mrs. Bush was not qualified by reason of being a married woman to enter the tract of land involved in this cause.

11th. The Hon. Commissioner erred in not holding that Mrs. Bush was the head of a family, and as such was entitled to enter the tract of land in dispute as a qualified homestead entryman.

The real question involved is as to whether the claimant here can be considered in the contemplation of the law the head of a family, and therefore of the class entitled to acquire public land under the homestead law. That the husband is in law the head of the family will not be disputed. As such head of the family it is his duty to provide a home, and the home selected by him is, in law, the domicile of the family. So long as the husband provides a home suitable to his condition in life and commits no act that would entitle the wife to have the marriage dissolved, that home remains her domicile.

The general rule laid down by Jacobs in his *Law of Domicile* (Sect. 209) is as follows:

As a general rule, it has been universally held in all civilized countries, and in all ages, whenever the subject of domicile has been discussed, that, upon marriage, the domicile of the wife merges in that of the husband, and continues to follow it throughout all of its changes, so long as the marriage relation subsists.

While this may be accepted as the general rule, it is settled by the weight of authority that there may be conditions which would justify the wife in leaving the domicile of the husband, and authorize her to establish a home of her own. In *Cheever v. Wilson* (9 Wall., 108), the supreme court said:

It is insisted that Cheever never resided in Indiana; that the domicile of the husband is the wife's, and that she cannot have a different one from his. The converse of the latter proposition is so well settled that it would be idle to discuss it. The rule is that she may acquire a separate domicile whenever it is necessary or proper that she should do so. The right springs from the necessity of its exercise, and endures as long as the necessity continues.

The rule is more fully stated in the case of *Barber v. Barber* (21 Howard, 582), wherein the court used the following language:

The general rule is, that a voluntary separation will not give to the wife a different domiciliation in law from that of her husband. But if the husband, as is the fact in this case, abandons their domicile and his wife, to get rid of all those conjugal obligations which the marriage relation imposes upon him, neither giving to her

the necessities nor the comforts suitable to their condition and his fortune, and relinquishes altogether his marital control and protection, he yields up that power and authority over her which alone makes his domicile hers.

A married woman who is thus entitled to establish a domicile of her own separate and apart from that of her husband is held by this Department, and properly so, to be authorized, if otherwise duly qualified, to acquire a homestead upon the public domain.

Since, however, the presumption of law is against the right of a married woman to make homestead entry one claiming such right must show such facts as clearly establish her claim. Mrs. Bush has not done that in this case. She has shown no misconduct upon the part of her husband, no desire upon his part to sever the conjugal relation, no failure to provide her with all the comforts of life, if she would only return to their common home. Great stress is laid, in argument, upon the fact that Mrs. Bush had with her a minor grandchild dependent upon her for support, it being claimed that by reason of this fact she was the head of a family, and therefore entitled to make homestead entry. In support of this contention, the case of *Newell v. Petefish* (20 L. D., 233), is cited. In that case an unmarried woman under twenty-one years of age, who had legally adopted a child, was held to be the head of the family, and therefore, as such, entitled to make homestead entry. In that case the applicant was at full liberty to establish her domicile wherever she might see fit, while here the claimant had, by her marriage, made the domicile of her husband hers, and might desert it only under conditions which would justify her in such action under the rules laid down by the courts hereinbefore referred to. The cases are not parallel.

The conclusion reached in the decision appealed from is correct, and said decision is hereby affirmed.

HOMESTEAD—SECOND ENTRY.

JAMES J. KUBAL.

The right to make a second homestead entry may be properly recognized where the first, in good faith, was abandoned on account of poison ivy growing on the land, and the claimant's susceptibility to poisoning therefrom.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 19, 1897. (J. L. McC.)

James J. Kubal, on June 24, 1895, made homestead entry for the SW. $\frac{1}{4}$ of Sec. 14, T. 96, R. 62, Mitchell land district, South Dakota.

On August 28, 1895, he made application to be allowed to amend said entry, by entering in lieu of the land covered thereby, the NE. $\frac{1}{4}$ of Sec. 25, T. 97, R. "66," same land district—at the same time relinquishing his homestead entry made June 24th preceding.

Subsequently he discovered that the land which he had intended to take in lieu of that entered on the 24th of June had been erroneously

described in his application of August 28th, and he made another application to enter—this time correctly describing said land as the NW. $\frac{1}{4}$ of Sec. 29, T. 97, R. "65."

To his application for a correction of the description of the land he intended to enter, so as to correspond with the facts, there would appear to be no objection. His application, however, to be allowed to change his actual location from the SW. $\frac{1}{4}$ of Sec. 14, T. 96 N., R. 62 W., to the NW. $\frac{1}{4}$ of Sec. 29, T. 97 N., R. 65 W., presents a question of greater difficulty, inasmuch as it is not, as his attorney calls it, a mere matter of amendment, but is in fact an application to make a second entry. Your office decision of February 8, 1896, denies said application, holding that the showing made by him is not sufficient to justify the allowance of a second entry. From said decision Kubal has appealed to the Department.

Kubal and his family—consisting of his wife and five children—took up their residence on said land in Sec. 29, September, 1895, and have resided thereon ever since. His application to make entry thereof is accompanied by and based upon an affidavit setting forth, in substance, that there is a creek-bed running through the tract first settled upon in Sec. 14, wherein grows in profusion a plant commonly known as poison ivy; that affiant is very susceptible to this poison—so much so that in passing over the ground where it grows the poison attaches to his body and prostrates him; that he "has been under treatment for injury resulting from this poison ivy for about three weeks"; that his physician advised him that he could not live on the land in Sec. 14, on account of said poison ivy; affiant immediately settled upon the tract to which he applied to amend, and has since placed the following improvements thereon:

built a house twenty by thirty, nine feet high; a barn fourteen by twenty-eight, twelve feet high; completed a good well; . . . that he could not live on the land he took as a homestead in June, 1895; . . . that he did not sell his improvements on same to any one, nor receive a cent for relinquishing his rights to same from any source; . . . that he has now expended all his money and much time by way of improvements, which will be worthless unless he is allowed to amend to this tract.

Kubal files the certificate, under oath, of his physician, C. Vernon Fox, who states that he has had said Kubal under his treatment for poisoning by poison ivy,

which grows in profusion upon his claim, the SW. $\frac{1}{4}$, 14-96-62; that said Kubal is so susceptible to this poison that he can not live upon this land, and I advise him to have his filing changed to some other part of the reservation, where this plant does not grow. He can not recover from the poisoning so long as he remains on this land.

It is fair to assume that Kubal was influenced in his action by this advice of his physician and to that extent acted in good faith. In a letter to your office, dated November 12, 1896, the register of the Mitchell land office says:

I fully believe that said applicant James J. Kubal has acted in good faith; that he ought not to be deprived of this land, upon which he has been actually residing since September, 1895, and upon which he has made valuable improvements. Un-

doubtedly Kubal received and followed erroneous advice in this matter. It appears that the main obstacle to the restoration of his homestead right is the fact that he relinquished his homestead entry No. 30,193, for the SW. $\frac{1}{4}$ of Sec. 14, T. 96, R. 62. Relative to this I desire to call your attention to the fact that said relinquishment was filed in this office August 28, 1895, at 9:25 a. m., and that said tract remained vacant until November 15, 1895, when George Bermann made homestead entry No. 30,384 for said tract; this leads me to believe that Kubal did not receive any consideration when he relinquished. I firmly believe this is one of those cases where the equity power vested in the land department should be invoked and used in behalf of the petitioner.

It may be worthy of notice that Kubal is not asking the United States to donate to him the land he now applies for, under the provisions of the general homestead law (although he must comply with the provisions of that law as to residence, cultivation and improvement); but he is to pay for said land, at the rate of three dollars and seventy-five cents per acre, under the special provisions of the 12th section of the Indian appropriation act of August 15, 1894 (28 Stat., 286-319).

The question in issue is, whether it would be a violation of any law for the United States to sell to him, under the circumstances hereinbefore set forth, the land he now applies to purchase?

The law bearing upon this question is found in section 2289 R. S., which provides that,

every person . . . shall be entitled to enter *one* quarter-section or a less quantity of unappropriated public lands;

and section 2298, which says:

No person shall be permitted to *acquire title* to more than one quarter section under the provisions of this chapter.

In order to prevent persons from making entry of land, holding it for speculative purposes, selling their rights, and making another entry, the regulations of the land department have provided not only that a person shall not "acquire title" to more than one quarter section, but that he shall not make more than one *entry*—even though under his first entry he may not "acquire title."

The Department held, in the case of Edward C. Davis (8 L. D., 507, syllabus,) that

a second entry may be allowed where the first covered land that is not habitable, and the reasons therefor were not discoverable, by the exercise of ordinary diligence, at the time of making entry.

In the case of William E. Jones it held (9 L. D., 207):

A second homestead is permissible, where the first is made in good faith, but the land covered thereby is not inhabitable on account of the non-potable character of the water obtained thereon.

See also the cases of Charles F. Babcock (9 L. D., 333); and Lewis Wilson (21 L. D., 390).

The case under consideration is not in all respects similar to those above cited; but these decisions serve to show the extent to which the Department has gone in the exercise of its discretion in the matter of

allowing second entries, which discretion it will exercise as circumstances require, in the interests of justice and equity. Kubal has relinquished his first entry, in pursuance of what he believed to be good advice, and the land embraced therein has been entered by another person. If his application to make a second entry is rejected, he cannot be reinstated in his first entry, and the improvements he has made upon both, in making which he has expended all his earnings during his lifetime, will be lost, leaving him in penury. There is no adverse claim to the tract which he desires to enter. In my opinion, in view of the manifest good faith of Kubal, and of the fact that he received no benefit from his first entry, it will be no violation of the homestead law to permit him to make a second entry as prayed for in his petition, and I so direct.

The decision of your office is reversed.

HOMESTEAD—SETTLEMENT CLAIM.

HALL *v.* SMITHSON.

The right of a person, who is residing upon a tract of land under the mistaken belief that his title thereto is complete under a prior patent, to enter said tract on the relinquishment of a record entry thereof, is superior to, and will defeat an intervening soldier's additional homestead entry, made with knowledge of the adverse claim.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 19, 1897. (C. J. G.)

I have considered the appeal of August Hensgen, assignee of William M. Smithson, from your office decision of March 31, 1896, holding for cancellation the latter's soldier's additional homestead entry for lot 3, Sec. 23, T. 1 S., R. 1 W., Salt Lake City land district, Utah, and allowing John Hall to make homestead entry for said tract.

The facts in this case and the law applicable thereto are sufficiently stated in your said office decision; and for that reason it will not be necessary to repeat the full history of the case.

The records of your office show that the plat of survey of said township was filed in the local office July 10, 1869, and that lot 3 remained undisposed of and subject to entry until January 24, 1894, when one Genevieve M. Bartlett made homestead entry therefor. Bartlett relinquished her said entry July 20, 1894. On the latter date a soldier's additional homestead entry, in the name of William M. Smithson, was made for said lot 3, and final certificate was issued on the same day.

On August 7, 1894, John Hall filed an application to make homestead entry of the land in controversy, which was rejected by the local office on the ground that said land was embraced in Smithson's entry. Hall appealed from the rejection of his application and asked for a hearing, which was finally had on June 12, 1895.

It appears that John Hall purchased a tract of land which was thought to include lot 3 from parties who supposed they had title thereto under a United States patent granted to one Lees in 1872. The testimony adduced at the hearing shows that Hall had resided on said land more than five years; that he had been in possession and cultivated it for more than seven years; that he has brought the land under a high state of cultivation, and has improvements thereon of the value of \$2,000; and that said land "was all inclosed, occupied and improved" by him at the date of Smithson's entry.

It is true that the land was subject to entry prior to Bartlett's filing and relinquishment, but under the mistaken belief that the description of the land he purchased included lot 3, Hall's failure to make earlier application to enter was justifiable and excusable. Under the peculiar circumstances and in the absence of any bad faith on the part of Hall it must be held that his rights immediately attached upon the filing of Bartlett's relinquishment, and were superior to any rights secured by the filing and allowance of the soldier's additional homestead entry. It appears that Hall did not know of Bartlett's entry, nor that the land was subject to an adverse claim; consequently he relied implicitly upon what was regarded as a complete chain of title. Upon discovery of the mistake, not of his own making, he exercised due diligence in applying to enter, his application having been presented in eighteen days after the cancellation of Bartlett's entry.

Smithson's assignee testified that he was on the land in question prior to July 20, 1894, and admits that he saw improvements at that time. He would not acknowledge that said improvements were owned by Hall. He did acknowledge, however, that at the time of making entry, he knew of the deed which purported to convey the land to Hall. In view of this showing, even if the latter were not protected under his settlement rights, the Department would be justified in canceling the soldiers additional homestead entry.

In *Rector v. Gibbon* (111 U. S., 276), the supreme court, speaking of the system of public land laws, says:

Its aim has been to protect those who in good faith have settled upon public land and made improvements thereon, and not those who by violence or fraud or breaches of contract have intruded upon the possessions of original settlers and endeavored to appropriate the benefit of their labors. There has been in this respect in the whole legislation of the country a consistent observance of the rules of natural right and justice.

In *Johnson v. Johnson* (4 L. D., 158), it was said (syllabus):

The wrongful act of an entryman, whereby the settlement rights of another claimant for the same tract, were not protected by filing or entry, will not be allowed to inure to the benefit of such entryman.

While it may be urged that Hall was not an actual settler on this land within the strict definition of that term, yet the equities apparent in this case will not permit said land to be lost to Hall through such a technicality.

Your office decision is hereby affirmed.

HOMESTEAD CONTEST—ALIENATION.

DITTMER *v.* WOLFE.

The sale of land after the submission of final proof, but prior to the issuance of final certificate, will not defeat the right to a patent under the homestead law, if the record shows due compliance with law.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) August 19, 1897. (C. W. P.)

On November 19, 1890, William F. Wolfe made homestead entry, No. 201, of the NE. $\frac{1}{4}$ of Sec. 32, T. 12 N., R. 3 W., Oklahoma land district, Oklahoma Territory, and on January 12, 1894, submitted commutation final proof, and, as alleged by his counsel in his brief on appeal to your office, tendered full payment therefor, but it appears from the certificate of the receiver attached to plaintiff's appeal that no money was received by him in payment for the land. Final proof was suspended by the local officers, on account of a then pending contest, and to allow time to furnish proof of publication and the duplicate receipt.

On November 7, 1894, Lois Dittmer filed an affidavit of contest, alleging that Wolfe

made said homestead entry, No. 201, for said tract in fraud and violation of law, in this, that said tract was entered not exclusively for his own use and benefit, but collusively and in the interest of one David A. Harvey; and that he has sold several tracts of land.

On August 24, 1895, she filed an amended affidavit of contest, making the charges more specific. The amended affidavit charges that Wolfe, prior to the 19th day of November, 1890, entered into a contract with one David A. Harvey, whereby it was agreed that the said Harvey would relinquish his homestead entry for the said land, and that the defendant would make homestead entry of the same, and, upon Wolfe's receiving final receipt and the patent therefor, the tract of land should be divided between said Harvey and Wolfe, and that, in pursuance of said agreement, Wolfe made homestead entry, No. 301, for the land, and is holding the same, not for his exclusive use and benefit, but for the future use and benefit of the said Harvey. It further charges that Wolfe entered into a contract of sale with the Jackson Plow Company, prior to the submission of final proof, and that his final proof was to be made, in order that he could convey the land to the Jackson Plow Company in pursuance of his contract; that Wolfe also entered into a contract to convey a parcel of the land to James Wyatt, D. N. Biddle, and J. B. Wilson, respectively, as soon as he obtained title to the land, and that said contracts were made fraudulently and prior to the submission of Wolfe's evidence for final proof, and that said Wyatt, Biddle and Wilson have, in pursuance of said contracts, built residences and made other improvements upon the tract of land in dispute and are using the same for residence purposes.

A hearing was had. After Lois Dittmer had submitted her testimony, Wolfe demurred to the evidence, and the local officers, on October 9, 1894, rendered a decision in favor of the defendant. On appeal, your office affirmed the decision of the local officers. The contestant appeals to the Department.

From the record in the case, it appears that Harvey and Wolfe are brothers-in-law; that on April 30, 1889, Harvey made homestead entry of the land in controversy, but relinquished his entry on November 19, 1890, when the land was immediately entered by Wolfe; and that when Wolfe submitted his final proof, there was pending against his entry a contest by Annabella Owens, which has since been disposed of.

The charge that Wolfe made his homestead entry in the interest of David A. Harvey is not supported by the evidence. There were four witnesses examined by the contestant to prove this charge. Samuel H. Radabaugh testified to several conversations with Harvey, in which Harvey stated that he had an interest in the land and wanted to fix the matter up, so that he could get his interest out. On cross-examination, he said that in his last conversation with Harvey, Harvey said that "Wolfe owed him and he wanted to get it fixed up." To the question: "That is all he said about his interest?" he replied, "That is about all he said." Mrs. Rhoda Radabaugh, the wife of Samuel H. Radabaugh, testified to a conversation with Harvey in January, 1894, in which he stated that he had an interest in the land in controversy, and that he did not care what Mr. Radabaugh and Mr. Wolfe did. On cross-examination, she testified that Mr. Harvey did not say what kind of interest he had; "he said he had an interest."

Mrs. Mary Cross, a daughter of the Radabaughs, testified that she heard the conversation testified to by her mother. On cross-examination, interrogated as to what kind of interest Harvey stated he had in the land, she said: "He just said he had an interest—didn't say what kind of an interest that I remember anything of."

John Burton testified that he was an attorney at law; that he had several interviews with Harvey in regard to Annabella Owens's contest; that he wanted witness to get Miss Owens's contest dismissed. To the question, "At the time that Mr. Harvey and you had the conversation with reference to getting the contest dismissed, did Mr. Harvey say anything to you as to why he was so anxious to get the contest dismissed?" he replied: "It does not come to my memory just now. He said this: I will say what he did say on that point. He said that there was nothing in this Owens contest; that he had sold the claim himself to Wolfe for some \$3000 or \$4000, and that Wolfe had paid him \$300 or \$500, don't remember exactly what it was, and had given him his note for some \$2500, or something like that, as payment for the balance of the money for that relinquishment."

It is obvious that, even if Wolfe were bound by the declarations of Harvey, the testimony of these witnesses is very far from establishing

the charge that Wolfe's entry was made in the interest of Harvey, or that there was an agreement between Wolfe and Harvey, that Harvey should have half the land in dispute.

Upon the charge that Wolfe had agreed to sell several pieces of the land before final proof, the evidence shows that J. B. Wilson, about November 15, 1894, bought from Wolfe an acre and a half of the land; that James L. Wyatt, in July, 1894, bought five or six acres, and W. R. Riddle, August 13, 1894, bought "about two blocks, when it is laid out." A. F. Jackson, in the latter part of January, 1894, bought five acres for the Jackson Plow Company. The testimony shows that all these sales were made after Wolfe submitted his final proof.

It is held by the Department that the sale of land after final proof, but prior to the issuance of final certificate will not defeat the right to patent, when the record shows due compliance with law.

In the case of Charles Lehman (8 L. D., 486), it was held that when a person has in fact complied with the law up to the time of making proof, and can, at that time, truthfully make the requisite final affidavit, a sale thereafter, without such affidavit having been made, and prior to the issuance of final certificate, will not of necessity defeat the right to a patent.

In the case of Magalia Gold Mining Company *v.* Ferguson, 6 L. D., 218, it is said:

While it is true that the final certificate was not issued, yet the final proof showed that the entryman had complied with the requirements of the homestead law, and I see no reason why the final papers may not issue and the entry pass to patent.

In *Orr v. Breach*, 7 L. D., 292, Breach made final proof on May 12, 1882, and on May 24, 1882, conveyed the land to one Cheney. On January 20, 1883, the local officers accepted payment and issued final certificate and receipt as of that date. Subsequently A. F. Orr charged that the entry of Breach was fraudulent, in that he had conveyed the land to one Cheney on May 24, 1882. The Department said:

In the case of the Magalia Gold Mining Company *v.* Ferguson (6 L. D., 218), the Department held that where the final proof shows compliance with law the patent may issue, although the land was sold prior to the issuance of final certificate. The ruling in that case is fully applicable to the facts presented by the record herein. Before Breach sold the land he had done everything that the law required and had made due proof of such compliance and was therefore entitled under the law to patent for the land. Although the legal title yet remained in the United States the equitable title was in him.

See also the case of Eberhard Querbach, 10 L. D., 142, and the case of Gibbs *v.* Bump, 17 L. D., 366.

Upon the authority of these cases, I concur in the conclusion reached by you that the sale of portions of the land in controversy, as shown by the evidence, was not in violation of law, or evidence of bad faith on the part of the defendant.

The decision appealed from is affirmed.

SURVEY OF FOREST RESERVATIONS—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

In carrying out the provisions of the act of June 4, 1897, with respect to the survey of forest reservations, the phrase "public lands adjacent thereto," should be construed to mean townships, either fractional or entire, actually adjoining such reservations.

Departmental instructions of June 30, 1897, herein, withdrawn.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) July 2, 1897. (W. A. E.)

The Department is in receipt of your office letter of June 22, 1897, asking to be advised as to the proper construction of the phrase, "and including public lands adjacent thereto," as used in the act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes."

Said act appropriates:

For the survey of the public lands that have been or may hereafter be designated as forest reserves by executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available.

The act further provides that:

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior.

As the surveys of these timber reservations are to be made under the supervision of the Director of the Geological Survey, it is necessary that a determination be reached as to the meaning of the words "public lands adjacent thereto," in order to prevent conflict between such surveys and those made under the immediate supervision of the surveyors-general.

It is suggested by your office that the surveyors-general be allowed to contract for surveys in all townships which do not actually adjoin the forest reservations. This would leave one tier or range of townships or fractional townships (as the case might be, according to the order setting apart the reservations) over which any necessary surveys may be extended under the supervision of the Director of the Geological Survey as "lands adjacent thereto," while all other lands would be subject to survey under the regular appropriation, and the supervision of the surveyors-general.

The suggestion seems to be a good one. The public surveys are generally made by townships and this was known to Congress, so it may

well be held that, recognizing the existing system it was not intended that the survey of any given township should be divided and that any township, whether fractional or entire, adjoining any such reservation constitutes "lands adjacent thereto" within the meaning of the statute.

This is in place of departmental letter of the 30th ult. upon this subject, which is hereby withdrawn.

ABANDONED MILITARY RESERVATION—FORT RANDALL.

INSTRUCTIONS.

*Assistant Commissioner Best to the Register and Receiver, O'Neill,
Nebraska, August 18, 1897.*

The appraisal of that portion of the lands in the Fort Randall abandoned military reservation in Nebraska, has been approved by the Secretary of the Interior.

The act of March 3, 1893 (27 Stat., 555), provides that the State of Nebraska may select as school indemnity within one year from the filing of the plats of survey of the reservation in the local office, the odd numbered sections in that portion of the Fort Randall reservation lying within said State, and that the even numbered sections, and all of the odd numbered sections not selected by the State, in said reservation, shall be opened to settlement under the homestead law only, after the lands so to be opened have been appraised by a commission of three disinterested citizens of the United States to be appointed by the Secretary of the Interior, and that

persons who may take such lands under the homestead laws, shall pay for such lands in three equal installments, at times to be fixed by the Secretary of the Interior, and they shall also comply with all provisions of the homestead laws of the United States.

According to your letter of November 27, 1896, the triplicate plats of survey of the lands in question, were filed in your office on that date. Hence, the period within which the State of Nebraska may make selection of the odd numbered sections, under the law referred to, will not expire prior to November 27, 1897.

Under the terms of said act of March 3, 1893, the even numbered sections on this portion of said reservation, and such of the odd numbered sections as may not be selected by the State within the time prescribed, were opened to settlement under the homestead law only. As said lands have been surveyed and appraised, and the appraisal approved, you are hereby directed to allow homestead entries to go to record for lands in the said even numbered sections, but you will, *under no circumstances, allow entries to go to record for any of the lands in the odd numbered sections on this reservation until further orders.*

In allowing entries for the lands in this reservation, under said law, you will in each case endorse on the application "Fort Randall Reser-

vation, Act of Mar. 3, 1893", and make the same notation on your abstract of homestead entries.

Under the provision of the homestead law an entryman has the right either to commute his entry after fourteen months from the date of settlement, or offer final proof under Sec. 2291 R. S.

The said act of March 3, 1893, permits payment for the land entered to be made in three equal installments, but does not prohibit full payment in cash for said land after compliance with all requirements of the homestead law. Therefore, in entries under said act, the entryman may, at his option, commute after fourteen months with full payment in cash, or, after submitting ordinary five year final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, or he may make payment in three equal annual installments, the first payment to be made at the time of the acceptance of his final proof, and the subsequent payments annually thereafter, without interest, the said law making no provision for the payment of interest.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate and receipt; and, in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount paid, reporting the same in a special column of the abstract of homestead receipts, and at the time last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the abstracts as before directed, to show that the entry covers lands in Fort Randall Reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service applies to entries made under said act of March 3, 1893, as to other homestead entries.

Where, upon submitting final proof, the entrymen may elect to make payment for the lands entered in three annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificates and receipts cannot be issued until the last payment is made you cannot charge the final commissions until said final certificates and receipts are issued.

Where the entrymen submit final proofs and elect to pay for the lands in installments, you will examine said proofs and, if they are acceptable to you, make proper notes on your records showing that satisfactory proofs have been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries, without issuing the final certificates, as such certificates can only be issued after all payment shall have been made.

There are no guarantees to be taken in order to secure payment of the installments, but if, when each installment is due, any entryman fails to pay the same, you will report the matter to this office when proper action will be taken in the case.

By letter "G" of March 3, 1897, addressed to Hon. J. V. Wolfe, Commissioner of Public Lands and Buildings for the State of Nebraska, it was held "that sections 16 and 36 in the township in the former Fort Randall reservation, do not inure to the State for the benefit of the public schools, but that the State must select other lands as indemnity therefor."

Approved.

THOS. RYAN,

Acting Secretary.

PRACTICE—DEPOSITION—PREFERENCE RIGHT OF CONTESTANT.

ATKINSON ET AL. v. SYKES.

Rule 28 of Practice requires an officer taking a deposition to read over to the witness the whole of the deposition, questions and answers, but makes no provision that the fact of such reading should appear either in the body of the deposition or the certificate of the officer. In all cases, however, it would be better practice that such officer should certify that he read over to the witness the deposition before it was signed or sworn to.

As between two contestants, attacking the same entry, the preferred right of entry should be accorded the first contestant, though the judgment of cancellation may have been rendered on evidence submitted by the second, if the same judgment is warranted by the evidence adduced under the prior contest.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 21, 1897.* (G. C. R.)

Departmental decision of March 24, 1897, involving the NW. $\frac{1}{4}$ of Sec. 12, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma, awarded said tract of land to William H. Atkinson, and in so doing reversed the action of your office in holding that Atkinson had disqualified himself by entering the territory during the prohibited period. The Department, however, sustained the finding of your office and the local office in respect to Benjamin G. Sykes, holding that he "is clearly disqualified" by reason of going into the territory in advance of the opening, etc. Both Smith and Sykes have filed their respective motions for review of said departmental decision.

In the decision complained of it is said, that "Atkinson alone has appealed to this Department," and Sykes, among other things, alleges error in that statement.

It appears that Sykes did appeal; but the appeal appears to have been transmitted in a separate communication from your office, and had either not reached the record when the case was here considered, or was inadvertently overlooked. However this may be, the record

was carefully examined and the issue decisive of Sykes' rights was definitely settled—namely, that he entered the territory in advance of the opening, and thereby obtained an advantage over others.

The testimony, upon which Sykes was held disqualified by the local office, by your office, and by the Department, was given in a deposition sworn to by George Harmon, who testified that he, in company with said Sykes and two others (Faulk and Polk), went into the Oklahoma territory "at about the hour of eleven o'clock, Sunday evening, April 21, 1889;" that after crossing the South Canadian River, deponent, Sykes and another party went to a point about three and a half or four miles southeast of Oklahoma City, and that deponent was with Sykes "all the forenoon of that day (April 22, 1889,) on and in the vicinity of the land in controversy." Sykes was present at the hearing, and was requested by both Smith and Atkinson to take the stand, and testify as to his qualifications; this Sykes refused to do, at first stating that he was under no obligations to appear as a witness for either party; afterwards he offered a second excuse, stating that he relied upon his motion to suppress the deposition of Harmon, whose testimony is above given. Sykes, in his motion, still insists that the deposition should have been suppressed.

The point urged in support of the motion to suppress Harmon's deposition was the failure of the officer (B. N. Woodson, probate judge of "K" Co., O. T.), before whom the deposition was taken, to make it appear in the body of the deposition or in his certificate that the deposition was read to the deponent before he subscribed his name thereto. It is urged that in this respect Practice Rule 28 was not complied with. That rule reads as follows:

It is the duty of the officer before whom the deposition is taken to cause the interrogatories appended to the commission to be written out and the answers thereto to be inserted immediately underneath the respective questions, and the whole, when completed, is to be read over to the witness, and must be by him subscribed and sworn to in the usual manner before the witness is discharged.

While this rule makes it the duty of the officer to read over to the witness the whole of the deposition, questions and answers, it does not require that the fact of such reading should appear either in the body of the deposition or the certificate of the officer. In all cases, however, it would be better practice that the officer should certify that he read to the witness the deposition before the witness signed or swore to it; especially when the witness signs by mark.

The witness in this case appears to have signed his name; the deposition in all other respects appears to have been regularly taken, and no fraud was alleged in its procurement. Sykes had an opportunity to deny it; it is presumed that if it had been untrue, he would have done so. He was silent when it was all important for him to have spoken, if Harmon had in fact sworn falsely. His election to rely upon his motion to suppress the deposition, rather than to take the more direct course

and deny his presence in the territory at the time and under the circumstances stated by Harmon, amounts to a practical admission that he disqualified himself—a fact at no time denied by him.

The motion to suppress the deposition was properly overruled. It follows that no error was made by the Department in stating that Sykes “is clearly disqualified.” This makes it unnecessary to notice other points raised in Sykes’ motion, which is hereby denied.

The motion filed by Smith, while alleging ten errors practically raises but two questions:

1. That it was error not to have held from the evidence that Atkinson disqualified himself by being in the territory during a part of the prohibited period.

2. That assuming that Sykes was the first settler on the land, it was error not to have awarded the preference right to Smith, upon whose testimony Sykes’ entry was held for cancellation.

As to the first alleged error, it may be said that no questions of either law or fact are raised therein which were not fully considered and discussed in the decision complained of.

Answering the second ground, movant is in error in assuming that the testimony shows that Sykes settled on the land before Atkinson settled thereon. Even if he did, it could make no difference in the result, for it clearly appears that Atkinson settled before Smith, and had begun proceedings looking to the cancellation of Sykes’ entry before Smith filed his affidavit alleging Sykes’ disqualifications.

Atkinson, among other things, alleged that Sykes deceived him and caused him to enter the wrong tract, and by that deception succeeded in getting his own entry upon the land which Atkinson had selected and settled upon. He further alleged that he was the prior settler. These charges were sustained by the testimony in the record. Much testimony was therefore given as to Atkinson’s qualifications; had Smith succeeded upon that issue—the principal one relied upon—he might have won his case, and while the judgment holding Sykes’ entry for cancellation was rendered principally upon the testimony as to Sykes’ conduct in entering the territory before the day of opening—a fact clearly proved—still the same judgment was warranted by evidence given on Atkinson’s prior contest. In such case he is entitled to make entry. *Carlson v. Bradlee*, 12 L. D., 525.

The confusion incident to the settlement of the separate issues under the two contests resulted from the erroneous action of the local officers in consolidating the contests, which should not have been done. *Capelli v. Walsh*, 12 L. D., 334; *Holm et al. v. Laughlin*, 21 L. D., 275.

Smith’s motion is also denied.

ISOLATED TRACT—APPLICATION FOR SALE.

JACOB SCHUTZ.

The status of a tract, as public land, is not affected by an application for an order for its sale as an isolated tract under section 2455 R. S., prior to favorable action on such application.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 25, 1897.* (G. B. G.)

Jacob Schutz has appealed from the decision of your office of February 28, 1896, affirming the action of the local officers in setting aside the sale of the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 9, Tp. 8 S., R. 65 W., Denver, Colorado, land district, made under section 2455 of the Revised Statutes.

The record shows that Schutz filed a petition in the local office on November 8, 1894, asking for the sale of said land as an isolated tract. This petition was forwarded to your office, and was there rejected for irregularity, and returned for amendment.

On July 5, 1895, the said Schutz filed an amended petition, which was forwarded to your office on the same day, and on October 5, 1895, your office, holding that the petition submitted conformed to the requirements of the law in such cases, directed the local officers to offer said described tract at public sale in accordance with the instructions contained in the circular of April 11, 1895 (20 L. D., 305).

The land was so offered, and on December 5, 1895, "was bid in and bought by Jacob Schutz, at the rate of \$1.25 per acre." Schutz tendered payment for the land so purchased, when it was discovered that said land had been entered by one Axel Carlson as a homestead on September 7, 1895, whereupon his purchase was declared null and void and the sale set aside by the local officers, which action, as has already been seen, was approved by your office.

It is contended by counsel for Schutz, that the filing of his petition for the sale of this land as an isolated tract under section 2455 of the Revised Statutes operated as a reservation of the land for the purposes of the Statute, and that he thereby acquired a right to bid for the same at public sale.

Said section, as amended by act of February 26, 1895 (26 Stat., 687), is as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The power conferred on the Commissioner of the General Land Office by this statute is a discretionary one. The statute itself is in no sense mandatory.

The filing of a petition for the sale of a tract of land thereunder could not operate, therefore, to disturb the status of the land, and until it had been ordered into market, it occupied the status of unappropriated, non-segregated public land.

The tract in controversy was therefore legally subject to the homestead entry of Carlson on September 7, 1895.

Your office decision is affirmed.

HOMESTEAD CONTEST—ABANDONMENT.

TEKSETH *v.* NOBEN.

The absences of a homesteader from the land covered by his entry should not be regarded as sustaining a charge of abandonment, where he has once established residence, and his absences are made necessary by the nature of his occupation, and condition in life, and his intention of returning to the land is at all times manifest from the cultivation thereof, and the erection and maintenance of improvements thereon.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 25, 1897.* (H. G.)

This is an appeal from your office decision of February 5, 1896, holding for cancellation the homestead entry of Charles N. Noben for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of Sec. 22, T. 141 N., R. 43 W., Crookston, Minnesota, land district.

Noben made homestead entry for the land July 7, 1891. On May 7, 1895, Svend L. Tekseth filed an affidavit of contest alleging that the entryman had wholly abandoned said tract and changed his residence therefrom for more than six months since making said entry and next prior to the date of contest; that the tract is not settled upon and cultivated by Noben, and that he "never established a residence on said land."

A hearing was had at which both parties appeared and submitted testimony.

On July 22, 1895, the register and receiver recommended the cancellation of the entry and Noben appealed. On February 5, 1896, your office affirmed the decision of the local officers, held Noben's entry for cancellation, and thereafter denied a motion for review.

Noben appeals.

The evidence discloses that the entryman was a single man when he made the entry, and that prior thereto the land had been held for about thirteen years by the father of the entryman, under a timber culture entry, and that during that time about seventy acres of the land had

been broken and were in cultivation. The timber culture entry was relinquished about the time claimant made his entry.

In October, after he made his entry, Noben caused to be built a small frame house on the tract and placed therein a bed, bedstead, bed clothing, cooking utensils, and other articles of household equipment. It satisfactorily appears that Noben established his residence on the land in question. In July, 1893, he had a few repairs made on the house, but the preponderance of the evidence shows that it was at all times habitable and comfortable for the occupancy of the entryman.

Prior to the initiation of the contest, the entryman made arrangements to build a large house on the claim, contracted for sufficient lumber for that purpose, and a part of it was delivered on the claim, the remainder being left at his father's house, temporarily, owing to the obstruction of the roads by snow. This building was in process of erection at the time of the hearing, its construction having been delayed by sickness in the family of the carpenter employed to build it. Noben was intending to marry and this second house was being constructed for a home for himself and wife.

The evidence shows that he was an industrious, frugal and energetic young man, who had no means to improve the tract, except such as he could earn by working away therefrom. A portion of the time he worked on a farm, and he was for about a year a clerk in a store. By these means he earned about \$18.00 per month, excluding board, which was, apparently, devoted to improving the land. He was necessarily away from the tract, engaged at these occupations, the greater part of the time, but returned at intervals of about two months. He slept in the house only thirteen times before the contest was initiated, but he worked on the tract many times, cultivating and improving it, while he slept at other places.

He has not had a home elsewhere, but has claimed this land, familiar to him from his early childhood, as his home. He always voted in the precinct where the land lies; he was assessed for and paid taxes on his improvements on the tract, and has persistently clung to it as his home.

In addition to the land broken on the tract before his entry, he broke four acres and cultivated all the land for each year, has hauled fertilizers upon it and removed stone therefrom. He lost two crops in successive years by destructive hail storms, and from this misfortune, and other circumstances, he evidently could but barely have eked out an existence on the land if he had remained there continuously since the entry.

There is evidence showing that the father of the entryman, who lived on the adjoining tract, worked upon the claim after this entry was made, but there is no evidence of any collusion between the elder Noben and the entryman, or any showing that the land was being held for the benefit of the father.

No inflexible rule has been followed in kindred cases, and none can be laid down that shall meet the circumstances of each case. A citizen does not lose his residence or domicile by leaving his home, so long as there exists in his mind the *animus revertendi*, where his residence has once been established under a homestead claim and his absences are made necessary by the nature of his occupation and condition in life, and the intention of returning to the land is manifest at all times from the cultivation thereof and the erection and maintenance of improvements thereon. This doctrine is firmly established by a multitude of cases, the following of which are in point: *Fyffe v. Mooers* (21 L. D., 167); *Colburn v. Pittman* (12 id., 497); *George F. Lutz* (9 id., 266); *Helen E. Dement* (8 id., 639); *Lulu M. Marshall* (6 id., 258) and *Edwards v. Sexson* (1 id., 63).

Since the appeal was taken, the entryman has filed the affidavit of the clergyman who officiated at his marriage, and who states that he visited the contestee upon the land in dispute and found the new house thereon well furnished and inhabited by the entryman and his wife, but this affidavit cannot be considered on appeal as the contest must be determined upon the evidence submitted at the hearing.

I am not unmindful of the rule of this Department which regards the concurring decisions of your office and the local office generally conclusive upon disputed questions of fact, where there is a conflict in the evidence, yet this rule has its exceptions, and if a careful review of all the evidence submitted, induces the belief that such decision is clearly wrong, the judgment will be reversed. (*Hargrove v. Robertson* (15 L. D., 499). In the case at bar, an examination of the evidence convinces me that the allegations in the contesting affidavit are not supported by the preponderance of the evidence, where there is a conflict in the testimony. Much of the testimony on behalf of the entryman is uncontradicted, and all of the evidence carefully considered induces the belief in my mind that the entryman has acted in good faith in establishing and maintaining a residence upon his homestead claim, and that his absences therefrom are not to be considered as an abandonment of such residence.

The decision of your office holding the entry of Charles N. Noben for cancellation is reversed, and the contest is dismissed.

DESERT LAND CONTEST ACTS OF JULY 26, AND AUGUST 4, 1894.

RANDALL ET AL. v. MORTON.

The acts of July 26, 1894, and August 4, 1894, extending the time for the submission of final proof on desert land entries, are applicable to an entry made under the act of 1877, in default as to final proof at the passage of said acts; and an entry occupying such status is not thereafter subject to attack for non-compliance with law, until after the expiration of the extended period provided for in said acts.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 25, 1897.* (G. B. G.)

On April 2, 1877, Howard Morton made desert land entry No. 53 for the S. $\frac{1}{2}$ and the NW. $\frac{1}{4}$ of Sec. 30, T. 28 S., R. 25 E., Visalia, California. The entry was suspended by departmental order of September 28, 1877, which order of suspension was revoked January 12, 1891.

On May 14, 1896, Joseph Randall and Eugene Verdier applied jointly to contest said entry, charging failure to reclaim the land or to comply with any of the desert land laws. The local officers rejected said application, because filed prematurely. The applicants appealed; and on January 22, 1897, your office affirmed the decision of the local officers, and refused to order a hearing.

Your office held said application to be premature for the reason that the time within which reclamation of the land might be made, under the acts of July 26, and August 4, 1894 (28 Stat., 123, 226), had not expired.

From this decision Randall and Verdier have appealed, the grounds of the appeal being that the life of the entry had expired before the passage of said acts, and that the entryman had made no annual expenditures or yearly proof.

The act of March 3, 1877 (19 Stat., 377), under which this entry was made, did not require annual proof. The act of March 3, 1891, amendatory thereof, did require annual proof; but this requirement did not affect entries made under the act of 1877, unless the entryman elected to proceed with his entry under the amendatory act, which was not done in this case. A failure to submit annual proof, therefore, is no ground of contest.

Was it subject to contest on May 14, 1896, for non-reclamation?

In the case of the *United States v. Haggin* (12 L. D., 34), involving a Visalia desert land entry, suspended at the same time as the one here involved, it was said:

The time between the date when said order of suspension became effective and the date of the notice of its revocation will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

Your office decision states and the record shows, that the entryman, Morton, did not receive notice of the aforesaid revocation of January 12, 1891, until August 21, 1893.

The time that elapsed between April 2, 1877, the date of entry, and September 28, 1877, the date of suspension, was five months and twenty-six days, and between August 21, 1893, the date of notice of the revocation, and May 14, 1896, the date of filing the complaint, was two years, eight months, and twenty-three days. These two spaces of time aggregate three years, two months, and nineteen days.

Under the terms of the act of 1877 the lifetime of an entry is three years. In the absence of intervening legislation, therefore, this entry would have been subject to the contest of Randall and Verdier at the date of their application. But, in the year 1894, two acts of Congress were passed in relation to desert land entries.

In the case of *Hodgson v. Epley* (23 L. D., 293,) it was held that the act of July 26, 1894 (*supra*), extended the time for making proof and payment on all desert land entries for one year beyond the time at which proof and payment were due, and would thereafter fall due under the then existing law, and that the act of August 4, 1894 (*supra*), extended the time for making final proof on all entries occupying the status of the one here under consideration to five years from the date of the entry.

It follows, therefore, that only three years, two months, and nineteen days of this period having elapsed from date of entry to date of the filing of the complaint herein, exclusive of the period of suspension, the contest is premature. *Farnell et al. v. Brown* (21 L. D., 394).

Your office decision is affirmed.

Departmental decision of July 27, 1897 [unreported], herein, is hereby recalled and vacated.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

WEYERHAUSER v. CROYSTER.

The right of purchase from the government under section 5, act of March 3, 1887, is limited to conditions presented at the time of, or prior to the final adjustment of the grant, and hence does not extend to a purchase from a railroad company after such adjustment and the restoration of the land to settlement and entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 25, 1897.* (F. W. C.)

Frederick Weyerhauser has appealed from your office decision of June 15, 1895, sustaining the action of the local officers in rejecting his application to purchase, under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29, T. 49 N., R. 10 W., Ashland land district, Wisconsin.

This tract is within the indemnity limits of the grant made by the acts of June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66), to aid in the construction of the road now known as the Chicago, St. Paul,

Minneapolis and Omaha Railway. An adjustment was submitted by your office of said grant, which was duly approved, and in accordance with the directions given, those lands within the limits of the grant for said company, and not patented on account thereof, were ordered restored by the order of February 12, 1890. This order was directed to be modified by departmental decision of December 19, 1890 (11 L. D., 607), so as to extend the time when the restoration should take effect until after ninety days' notice thereof, through advertisement, shall have been previously given by the district land officers, which advertisement shall also contain a notice to parties claiming as purchasers under said act, requiring them to come forward during said period of ninety days, submit their proof, and make payment, in pursuance of the requirements of the official circular of February 13, 1889 (8 L. D., 348); and that a failure to submit proof and payment within the time named would be treated as a waiver of claim; all land not so claimed to be subject to entry under the settlement laws by the first legal applicant at the expiration of the aforesaid period of ninety days.

The order of restoration was not put into effect until November 2, 1891, on which date all lands not patented on account of the grant for said company nor covered by applications to purchase under the provisions of the act of March 3, 1887, were held subject to entry.

In the patent that issued January 28, 1891, on account of this grant, was conveyed the SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ of said section 29. It will be noted that there is a duplication in the description—the "SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ " being covered by the description of the "N. $\frac{1}{2}$ of said section." The company had made selection on July 12, 1888, of the entire section, and it was evidently the intention to patent the tract here in question, namely, the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, instead of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, which, as before stated, was covered by the other description contained in the patent.

It is claimed in one of the briefs filed on behalf of Weyerhauser, that the tract here in question was omitted from the patent to the company through a purely clerical mistake—that the same had been listed for such approval and said listing had been approved by the Secretary of the Interior. This, however, is not borne out by the records of your office, which show that the patent conformed to the list, containing the same erroneous duplication in description.

It is further urged on behalf of Weyerhauser, that in the adjustment of the grant for said company this tract was duly charged against the grant. But inquiry at your office does not sustain this claim. One thing is clear—the tract was never patented on account of the grant for said company, nor included in any of the approved lists. So that it must be held to have been restored upon the final adjustment of the grant.

Weyerhauser's claim is based upon a purchase made from the company on December 1, 1891, after the final adjustment of the grant and the restoration of the surplus land.

The company, in 1894, sought to have the tract here in question

patented on account of its grant; and by your office letter of December 31, 1894, was submitted for the approval of the Secretary of the Interior a list including the tract here in question. The approval was at that time denied by departmental letter of January 9, 1895 (not reported); and in the letter returning the list it was stated:

The grant for said company has been fully adjusted, and the surplus lands not needed in satisfaction of the grant have been restored to the public domain. The purpose of this list is merely to correct errors occurring in the patents previously issued in satisfaction of this grant. . . . As to said tract your letter reports that in patent No. 16, issued January 28, 1891, the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section is twice conveyed, the first time being included in the N. $\frac{1}{2}$ of the section, and the second by separate description as the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said section. While it is evident that the double patenting of the tract before described was merely a matter of mistake, and that the tracts now embraced in the list were evidently intended instead of the double patenting, yet it must be remembered that upon the adjustment of the grant all lands not included in previous certification and patent were ordered restored and opened to settlement and entry.

The tracts under consideration being within the indemnity limits were therefore included in the order of restoration, and while as between the United States and the company there may be no objection to the approval of this list designed to correct the evident mistakes, yet such corrections can not be allowed, if, in the meantime, the rights of others have intervened.

Your office letter reports that the tracts are vacant and unappropriated. While this may be their status as shown by the records of your office, yet such records would not be conclusive upon the rights of others, and I have therefore to direct that public notice be given for at least thirty days, in one or more newspapers having general circulation in the vicinity of the tracts proposed to be now patented, advising all settlers thereon, if any there be, or persons claiming an interest in said land, of the contemplated patenting of the same on account of said grant, and requiring all such persons to formally present and make showing in support of any claimed rights in said land, by reason of settlement within the period of publication, and failure to so respond will be treated as an abandonment and waiver of any rights which may have heretofore attached to such lands.

This requirement is similar to that exacted in disposing of certain selections made by the Hastings and Dakota Railway Company (18 L. D., 511), and the course is deemed a proper one for the protection of any interest that may have attached to the land upon the restoration of the same, upon the formal adjustment of the grant.

Upon the expiration of the period of publication the local officers should be required to make due report to your office of any action taken, and you will make such further disposition of the matter as the facts as then presented may warrant.

On January 25, 1895, the company notified your office that, inasmuch as the grant to the Omaha Company had been fully adjusted and finally closed, the company was unwilling to accept or recognize any proceedings which might be construed into a claim upon its part that the grant had not been satisfied or fully adjusted under the act of March 3, 1887. Thereafter, in March following, Weyerhauser filed the application now under consideration in the local office; and on April 6, 1895, the local officers rejected his application on the ground that under the notice of restoration ninety days were allowed purchasers from the company within which to submit proofs and make payment,

and that a failure to do so was a waiver of any claim. Upon appeal your office held, in the decision now appealed from, that Weyerhaeuser was not entitled to purchase under the act of 1887, for the reason that he did not purchase of the company until after the final adjustment of its grant and the restoration of the lands to settlement and entry.

Charles Croyster protested against the allowance of Weyerhaeuser's application. His claim for the land rests upon an application made on April 10, 1895, to enter this tract under the timber and stone law. He lays no claim to the land prior to the presentation of Weyerhaeuser's application to purchase. So that the only question for consideration is as to whether Weyerhaeuser's claim, as established by the showing hereinbefore cited, brings him within the scope of the class of persons granted the right of purchase under the provisions of section 5 of the act of March 3, 1887.

In the case of *Andrus et al. v. Balch* (22 L. D., 238), it was held that (syllabus)—

In the exercise of the right to perfect title under section 5, act of March 3, 1887, it is not material whether the purchase from the company was made before or after the passage of said act, if made in good faith believing the title to be good, and before the land purchased was held to be excepted from the grant.

In said decision reference was made to the holding by this Department in the case of *Sethman v. Clise* (17 L. D., 307), in which the provisions of the act of 1887 were discussed at some length. In the last mentioned decision it was stated:

The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when in the adjustment of these grants it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if *bona fide*, should be allowed to purchase the tracts claimed by them.

This Department is only authorized to dispose of lands in accordance with law, and the full scope of the provisions of the act of 1887 would seem to limit its operation to the conditions presented at the time of or before the final adjustment of these grants. Being of this opinion, I must affirm the decision of your office and deny the application of Weyerhaeuser.

PRACTICE—REHEARING—SUPERVISORY AUTHORITY.

GOLDEN *v.* COLE'S HEIRS.

A motion for a rehearing filed out of time can only be received as an appeal to the supervisory authority of the Secretary, and should, therefore, be made by a petition addressed to such officer, and filed in the Department proper.

A motion for the review of a decision of the Secretary, in which he refuses to exercise his supervisory authority, is not provided for in the Rules of Practice, and will only be considered in cases presenting strong and exceptional reasons.

Matters occurring after the original hearing in a case do not furnish grounds for a rehearing therein, though such matters may afford sufficient foundation for a new contest.

A charge of abandonment will not lie against a homestead entry under which there has been full compliance with law for the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 27, 1897. (W. M. W.)

On the 14th of April, 1897, your office transmitted a paper, entitled "petition of certiorari," filed in your office in the case of *Golden v. Charles Cole's heirs*, involving the NW. $\frac{1}{4}$ of Sec. 5, T. 17 N., R. 2 E., Guthrie, Oklahoma, land district.

A reference to the record shows that Golden has filed two contests against Cole's entry. The first contest was finally decided adverse to Golden by the Department on April 15, 1893 (see 16 L. D., 375).

Golden's second contest against said entry was decided against him by the Department, on October 26, 1896—unreported. Notice of this decision was served November 10, 1896. A motion for review of said decision was filed by Golden November 30, 1896, which was denied January 18, 1897; and January 22, 1897, and February 3, 1897, Golden filed petitions each asking for a new trial and rehearing in the case. These were denied February 23, 1897.

On March 6, 1897, counsel for Golden filed in your office a motion for review of the departmental decision of February 23, *supra*. Said motion was returned to Golden's counsel under instructions given in the case of *Standley v. Jones*, 19 L. D., 104. On March 20, 1897, said motion was refiled in your office, and transmittal of the same was denied by your office on April 2, 1897. On April 6, 1897, a petition for writ of certiorari was filed, upon which no action has been taken by the Department. On April 14, 1897, your office transmitted to the Department the papers, stating that:

In the absence of any rule governing the case and the petition being addressed to you, I have the honor to transmit the same for your consideration and instruction of this office in the future.

The record being thus before the Department, it becomes unnecessary to consider the propriety of ordering its transmission under the application of Golden.

After the case was considered here, on the appeal of Golden, and on his motion for review, both of which were decided adversely to him, he had exhausted his rights under the Rules of Practice, and the case was closed. Notwithstanding this, he filed in your office a petition for rehearing, which was transmitted here. As Rule of Practice 114 provides that "motions for review and motions for rehearing" must be filed "within thirty days after notice of the decision complained of," Golden's application for rehearing, being filed more than thirty days after notice of the decision in the contest case, was manifestly out of time, and could only be received as an appeal to the supervisory power of the Secretary. This being so, it should have been made by a peti-

tion direct to the Secretary, filed here and not in your office, and therefore might properly have been returned by you, under the rulings in *Standley v. Jones*, 19 L. D., 104. The rules, however, were not rigidly enforced, no question was raised as to the regularity of the proceeding which brought the application here, and it was considered as though properly filed, and denied. When the motion for review of this last decision was presented to your office you might have also returned it under the *Standley v. Jones* decision.

A motion to review a refusal of the Secretary to exercise his supervisory authority is something unknown to our rules, and for which no precedent is found in the reports. In view of the importance of ending litigation such a practice should not be encouraged. Of course, if a sufficient cause for invoking the supervisory authority of the Secretary exists a petition to him for that purpose is in order so long as he has jurisdiction of the land, but a review of such decision should be entered upon only for strong and exceptional reasons, if at all.

As stated, the application for a rehearing, being after the time prescribed by rule 114, was an appeal to the supervisory power of the Secretary. That application was denied, and the present motion for review of that denial does not present a case justifying its consideration.

It may be observed, however, that the application for rehearing was distinctly based upon the ground of newly discovered evidence. It was held in that denial of that application that "the alleged newly discovered evidence" is not "in any sense newly discovered." In the so-called motion for review of this last decision it is now insisted that the matters, on which the application for rehearing was based—namely, abandonment—having occurred since the original hearing of the case, presented sufficient grounds, if true, for the exercise of the supervisory authority of the Secretary and the awarding of the land to Golden.

These allegations, if sustained, would not justify the re-opening of the former case.

In a proper case such facts might be a sufficient foundation for a new contest. But as applied to the case at bar such evidence could not be a foundation for any further contest, for the reason that the entry contested was made on the 27th day of April, 1889, and the five years cultivation and improvement required by law of the heirs of Charles Cole expired April 27, 1894, and notice of Golden's last contest affidavit was issued on October 2, 1894. Golden's last contest having covered matters of improvement and cultivation for the full period required by law, evidence relating to abandonment occurring thereafter could not in any sense affect the right of Cole's heirs to the land. In other words, the heirs having complied with the law in matters of improvement and cultivation for the full period required by law, the entry is not contestable on the ground of abandonment subsequent thereto.

The motion for review, whether treated as a second application for the exercise of the supervisory authority of the Secretary or otherwise, does not present such a showing as entitles Golden to any relief.

CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891—MINERAL LAND.

UNITED STATES *v.* OMDAHL.

The statutory period of two years designated in the proviso to section 7, act of March 3, 1891, contemplates calendar years without regard to the number of days they may contain, and is to be computed by excluding the day of the date of the final receipt and including the corresponding numerical day in the corresponding month of the second calendar year thereafter, and if that month in that year does not have that many days, then the last day of that month.

Under the provisions of section 2345 R. S., mineral lands in the State of Minnesota may be taken under the pre-emption law.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 27, 1897. (E. B., Jr.)

Petra O. Omdahl has appealed from the decision of your office, dated March 21, 1896, holding for cancellation her pre-emption cash entry, made December 30, 1890, for lots 1 and 7 of Sec. 24, and lots 1, 2 and 3, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 65 N., R. 5 W., Duluth, Minnesota, land district.

It appears that the entry was originally held for cancellation by your office on December 29, 1892, upon the report of Special Agent R. W. de Lambert, dated December 2, 1892, which charged, in substance, that Miss Omdahl had never resided upon the land, but that, from a period prior to the inception of her claim and up to the date of her entry, she had lived with her uncle in Duluth, Minnesota—distant in an air-line more than one hundred miles from the tract in controversy. On February 11, 1893, your office suspended its judgment of cancellation to allow one William J. Atwell to contest the entry on charges of the same nature as those contained in the report of said special agent. Atwell's application to contest having been in the meantime withdrawn, your office, on October 12, 1893, removed the suspension of its judgment and directed that claimant be duly notified of the action of December 29, 1892, and that sixty days would be allowed her within which to apply for a hearing in the premises, failing which, or to show that her entry should be sustained, the entry would be finally canceled. Upon her application a hearing was accordingly ordered, which (after long delay from causes not necessary to relate) was had on January 21, 1895. At said hearing the testimony of two witnesses on behalf of the government was taken. The defense offered no testimony, but appeared specially for the purpose of denying the jurisdiction of the land department to cancel such entry, for the reason that the proceeding had not been initiated within two years after the entry was made, and that the entry was therefore confirmed by the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095).

The entry, as already stated, was made, and the receiver's receipt was dated, December 30, 1890, and the entry was held for cancellation December 29, 1892. Counsel for defendant contends that, inasmuch as the year 1892 was a leap-year, two ordinary years of three hundred and sixty-five days each had elapsed before action was taken by your office.

The trouble with this contention is that the statute is not confined

to ordinary years of three hundred and sixty-five days. It refers to a year as designated in the calendar, without regard to the number of days it may contain; and the time thereunder is to be computed by excluding the day of the date of the final receipt and including the corresponding numerical day in the corresponding month of the second calendar year thereafter, and if that month in that year does not have that many days, then the last day of that month. (*Daley v. Anderson*, 48 Pac. Rep., 839.) In this case the two years expired December 30, 1892, and not before.

I concur in the conclusion of your office that Miss Omdahl's entry is not confirmed by the proviso to Sec. 7 of the act of March 3, 1891 (*supra*). The case must therefore be decided upon its merits.

The witnesses at the hearing were Mr. Young and Mr. Le Sueur, special agents of your office. The former examined the land in August, 1894; the latter in October of the same year; that is, about three years and eight months, and three years and ten months, respectively, after entry. They found claimant's house, as indicated in your office decision, to be in a somewhat dilapidated condition, and failed to find any evidence of recent residence or cultivation by claimant. They did, however, find evidence of the previous occupation of the house, and apparently by a woman. The final proof on its face is sufficient, showing such cultivation, improvement and residence as the law requires. The testimony taken at the hearing does not make a *prima facie* case against the entry. Such testimony showed a state of facts existing several years after entry, and not, as the final proof purports to do, the facts relative to the entrywoman's compliance with the law from the date of her alleged settlement in March 1890, to December 30, of that year. Beyond a knowledge of the condition of the land when it was visited—nearly four years after final proof was made—the special agents have no personal knowledge in regard to the facts on which the charge above stated is based.

Speaking of Le Sueur's testimony, your office decision says:

He understood it to be situated in the mineral belt, known as the "Vermillion iron range"; but he was not an expert in minerals or mineral indications.

Even if it had been clearly shown that said land was within the mineral belt, that fact would in no way have militated against the entrywoman's good faith, for she would have had a right to enter the same under the pre-emption law. Sec. 2345 of the Revised Statutes, in the chapter relating to mineral lands, provides:

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions. . . . Such lands shall be offered at public sale in the same manner, at the same minimum price, and under the same rights of pre-emption, as other public lands.

Upon careful examination of the evidence I conclude that the cancellation of this entry is not warranted. The decision of your office is therefore reversed, and the said entry will remain intact.

ENTRY-ISOLATED TRACT.

HENRY W. KOEN.

An entry allowed by mistake, of land not subject thereto, cannot be regarded as a disposition of such land, within the meaning of the first proviso to section 2455 R. S., as amended by the act of February 26, 1895.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 27, 1897. (E. B., Jr.)

On January 18, 1896, your office denied the petition of Henry W. Koen, filed June, 1895, to have lot 2 of Sec. 34, T. 22 S., R. 47 W., Lamar, Colorado, land district, ordered into market for sale under section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

Your office held that the tract in question did not come within the purview of said section as amended, for the reason that it had "only been subject to homestead entry for a period of a few months since the land lying south of it has been entered," and for the further reason that the said tract was "within the limits of the former Fort Lyon military reservation, and the act of October 1, 1890 (26 Stat., 561), providing for the disposal of said reservation, directed its disposition under the homestead law only."

Koen appeals from your office decision, assigning error therein as follows:

First. That he (you) erred in holding that the surrounding land about said lot 2 had not been entered, filed upon or sold by the government for a period of three years prior to the time said lot 2 was subject to homestead entry.

Second. That he (you) erred in holding that because said lot 2 was within the limits of the former Fort Lyon reservation, that it was not subject to the provisions of said section 2455 R. S., as amended by act of February 26, 1895.

As amended by the act of February 26, 1895, *supra*, section 2455 of the Revised Statutes reads:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

The particular tract to which your office decision refers as "lying south of" said lot 2 is a tract described as lots 9, 10 and 11 of said section, which was entered as a homestead on May 19, 1895, by one Charles H. Wright, and which entry remains intact of record. On December 4, 1889, one George W. Butler made pre-emption cash entry No. 3690 for the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section, having filed his declaratory statement therefor March 15, 1888; but when this entry was examined with a view to the issue of patent thereon, it

was found, from the records of your office, that a narrow strip of the land embraced therein was within the east boundary line of the old Fort Lyon military reservation. As this narrow strip, which is identical with and now described as said lots 9, 10 and 11, was not subject to Butler's filing or entry (*United States v. Smith*, 13 L. D., 533), your office, by letter ("G") of February 9, 1892, directed an amendment of his entry so as to exclude the said strip therefrom. As has been indicated, this strip of land was afterward, May 19, 1895, entered as a homestead by said Wright.

It is urged in the appeal that the land in this strip having, according to the record, been sold to Butler, on December 4, 1889, it was, in contemplation of the first proviso to said section, and in view of the date of Koen's petition, to be regarded as having been sold for more than three years before Koen's petition was filed, regardless of the fact that Butler's entry, as to the strip, was subsequently vacated, so far as the status of said lot 2 with reference to the strip was concerned.

This contention is not sound. The attempted sale of this strip to Butler under his pre-emption filing was undoubtedly made without knowledge on the part of the local office, or probably of Butler himself, that it was within the said reservation, was therefore due to mistake, and was also contrary to law, and so wholly void. Such attempted sale did not affect in any way the status of said lot 2 under said section 2455 as amended. When Wright entered it, May 19, 1895, it was public land, so far as appears, and at the date of said petition it had only been entered a few weeks, and at the date of denial thereof less than a year.

It appears, furthermore, from an examination of the records of your office, that said lot 2 is partially bounded on the west by lot 1 of section 33 of said township, and that said lot 1, with lots 2 and 3, of said section 33, was entered as a homestead by John B. Burton on May 19, 1894, only a little more than a year prior to the filing of said petition, and much less than two years prior to the denial thereof.

It is unnecessary, in view of the foregoing, to consider the second assignment of error in the appeal.

The decision of your office is affirmed.

REPAYMENT—COMMUTED TIMBER CULTURE ENTRY.

CASSIUS M. BROWN.

The return of surveyor-general's scrip, paid on the commutation of a timber culture entry, cannot be allowed on the ground that the entryman might have perfected title without commutation.

Secretary Bliss to the Commissioner of the General Land Office, August 15, 1896, denying his application to withdraw certain surveyor-general's
(W. V. D.) 27, 1897. (C. W. P.)

The appeal of Cassius M. Brown from your office decision of February 15, 1896, denying his application to withdraw certain surveyor-general's

scrip paid for the NW. $\frac{1}{4}$ of Sec. 8, T. 5 N., R. 67 W., Denver land district, Colorado, on commutation of his timber culture entry, No. 11,820, has been considered.

Brown's application is made under oath and dated December 27, 1895. He therein sets out that when he made final proof, he did so under the apprehension, and so believing, that he was under the law required to have a certain number of trees growing upon his claim before he could make final proof under the timber culture laws, except by commuting, and having earnestly and faithfully endeavored to grow trees upon his said claim, and having practically failed in being able to cause trees to grow thereon, notwithstanding yearly and repeated efforts, as more clearly and fully shown by the final proof which he submitted on the day last aforesaid, and believing that the law required him notwithstanding his inability to grow trees in order to complete his entry to pay for said land, he therefore, on said day, submitted proof as aforesaid and tendered in payment therefor certain surveyor-general's scrip, which was accepted in payment therefor; that having been advised and so believing that he has in every respect complied with the timber culture law, and that the government, in fact and in law, is not entitled to the money which he has tendered in connection with his said proof, and further believing that after the 13th day of February, 1896, the law will have been fully complied with, and that he will be entitled to his final certificate and receipt, without the payment of any money other than fees due the government, and being advised and so believing that the rules of the Department do not require any payment to be made under such circumstances, except fees and commissions, he, therefore, asks the Hon. Commissioner to permit him to withdraw the tender of the money or scrip, as made in his final proof, and that he may be permitted to submit said final proof again after the 13th day of February, 1896, or that the same may be accepted as his final proof in this case, subject simply to his duty—should the Commissioner require it—to advertise his intention of submitting said proof on, or any day after, the 13th day of February, 1896.

The record shows that Brown made timber culture entry, No. 11,820, February 13, 1888, for said tract, which he commuted to cash entry, No. 16,498, December 23, 1895.

Section 2362 of the Revised Statutes provides for repayment in cases where a tract of land "has been erroneously sold by the United States, so that from any cause the sale can not be confirmed." The act of June 16, 1880 (21 Stat., 287), provides that repayment may be made of fees and commissions and excess payments paid by innocent parties upon the location of claims under section 2306, when said claims were, after said location, found to be fraudulent and void, and the entries or locations made thereon canceled, or where entries are canceled for conflict, or where from any cause the entry has been erroneously allowed and can not be confirmed, or where double minimum price has been

paid for lands afterwards found not to be within the limits of a railroad grant, the excess, one dollar and twenty-five cents per acre, shall be returned.

The appellant's application is not authorized by any of the above provisions, and as repayment by this Department can not be made without statutory authority (E. M. Dunphy, 8 L. D., 102; A. W. Givens, Ib., 462; Elizabeth Zenker, 20 L. D., 551), said application must be denied. See also the case of Elizabeth C. Ward, 21 L. D., 287.

Your office decision is therefore affirmed.

OSAGE FILING—INTERVENING ADVERSE CLAIM.

ROWE v. ARMENT.

The delay of a party in perfecting title under an Osage filing, and the intervention of an adverse claim, will not defeat the right of such party, where said delay appears to have been caused by the loss in transmission of an appeal affecting another tract included in the same filing, and the intervening claimant fails to show due compliance with law on his own part.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 28, 1897. (E. B., JR.)

The land involved in this case is described as lot 1 of section 11, T. 27 S., R. 24 W., Dodge City, Kansas, land district, and is a parcel of the Osage Indian trust and diminished reserve lands, the disposal of which is provided for by the act of May 28, 1880 (21 Stat., 143). The second section of that act, under which this case arises, provides:

That all the said Indian lands remaining unsold and unappropriated and not embraced in the claims provided for in section one of this act, shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors on the public lands. Such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid; and, upon payment of not less than one-fourth the purchase price shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal installments, with like penalties, liabilities and restrictions as to default and forfeiture as provided in section one of this act.

It appears that on July 21, 1886, James C. Rowe and Thomas Masterson each filed Osage declaratory statement for lots 1 and 2 of said section (lot 2 being also part of said reserve land), and John S. Martin, on the same date, filed like statement for said lot 2 only, all three of them alleging settlement on May 31, 1886. On February 21, 1887, Martin having previously given notice of an intention to offer final proof, Rowe applied to be allowed to contest Martin's right to make final proof, which application was denied by the local office. Rowe thereupon appealed to your office. On February 24, following, Martin's final proof was accepted and he was allowed to make payment for the land and received final certificate therefor. On May 11, 1887, your

office affirmed the action of the local office in the case of *Rowe v. Martin*, and no further appeal appearing, patent issued to Martin for said lot 2 on July 2, 1890.

On February 28, 1887, Rowe offered final proof for both said lots before L. E. McGarry, then clerk of the district court of Ford county, Kansas, in which county the land is situated, against which proof, as to lot 1, said Masterson then and there protested. The final proof papers of Rowe, with tendered first payment for both the lots, and the protest of Masterson, appear to have been duly received at the local office (then at Garden City, Kansas), and on April 28, 1887, Rowe's tendered first payment was returned by the receiver with request that he retain the same "until decision has been reached." On March 28, 1888, the local office decided the case of *Masterson v. Rowe* in favor of Rowe, and, on the same date, duly notified the attorneys of the respective parties. No appeal from this decision is shown to have been filed.

Although neither the records of your office nor those of the local office show that any appeal was taken by Rowe from the decision of your office adverse to him, in his case against Martin, one H. McGarry swears that the firm of Frankey and McGarry, of which he was a member, then local attorneys at Dodge City, Kansas; prepared and duly forwarded, in due time after notice, in behalf of Rowe, as his attorneys, either to the local office or to the General Land Office, he believes to the former office, in accordance with the practice of the firm at that time, an appeal to the Secretary from the decision of your office in that case. A copy of the alleged appeal accompanies the affidavit of H. McGarry as exhibit "B" thereof. Rowe swears that he was informed that an appeal had been taken in his case against Martin and so believed until the latter part of 1894.

Inquiry made in October 1894, by Rowe's agent at Dodge City, J. M. Kirkpatrick, who had been in charge of lot 1 as such agent since March 1889, of the local office and of your office, developed the facts that the final proof papers of Rowe had been lost, apparently in the local office, and that no appeal appeared to have been perfected from the said decision of May 11, 1887, and that lot 2 had been patented to Martin as stated above.

It appears that Rowe lived upon the land in controversy from about June, 1886, until shortly after he offered his final proof, when, being a laborer and without means except from his labor, he went to work at said Dodge City, about seven miles from the land, and continued to work and reside there until March, 1889, when he went to Livingston, Montana, where he has since resided. His improvements consist of two houses, stable, well, ten acres broken, and land all fenced—valued at \$200.00. He appears to have been in possession of the land until some time in December 1894, when James A. Arment, defendant herein, attempted to make settlement thereon. Up to 1888, inclusive, Rowe cultivated ten acres of it. Since then, and until 1894, inclusive,

Kirkpatrick, as his agent, has cut hay on the land, except one or two years when herds of cattle pastured on it.

On December 26, 1894, Arment filed his declaratory statement for said lot 1, alleging settlement December 24, 1894, and on March 23, 1895, offered final proof therefor. On that date Rowe appeared, filed a protest against Arment's proof, setting out his own (Rowe's) claim to the land and alleging defect in the notice of Arment's proof and that he had not complied with the law as to residence on the land and cultivation thereof, and cross-examined Arment's witnesses. The case was continued from time to time until May 28, 1895. In the meantime new notice of Arment's final proof had been required and given, and Rowe had, on May 27, 1895, filed affidavits of various persons in support of his claim, and offered a reproduction of his final proof as to lot 1 and again tendered first payment therefor; and the final proof of Arment had, on the date last mentioned, been rejected "because of non-compliance with law in the matter of residence," and he had been given "sixty days in which to appeal or submit new proof." On May 28, 1895, Rowe's offered reproduction of final proof and his tender of payment were refused, to which he duly excepted. On July 15, 1895, Arment offered new final proof, and Rowe filed new protest against the same; and on the same date the local office accepted Arment's proof and rejected Rowe's protest, and therefrom Rowe appealed. On December 2, 1895, your office considered the case and decided that Rowe had lost his right to the land in controversy by reason of laches, that the proof of Arment was sufficient, and that he should be allowed to enter the land. An appeal by Rowe from your office decision brings the case here.

It appears from the final proof offered by Arment on March 23, 1895, and the testimony of himself and his witnesses on cross examination, that he was then, and for some years prior thereto had been the register of deeds for said Ford county, that on December 24, 1894, he built or had built on the land in controversy a frame house twelve feet square, unplastered, but lined with canvas, with shed roof seven feet from the ground at the lower point and nine at the higher, and that subsequently he had five acres of the land broken—these being his only improvements, and worth, at his own estimate, seventy-five dollars. He had placed in the house a few articles of necessary household furniture, and according to his own statement had commenced to reside on the land January 24, 1895, and had lived there two-thirds of the time since. The testimony of the witnesses did not corroborate Arment's statement, they having knowledge of his occupancy of his said house in a few instances only. When Arment made his alleged settlement he and his wife owned and resided in a commodious and well-furnished house in Dodge City. This house was kept completely furnished and was evidently occupied by Arment and his wife much of the time, at least between January 24, and March 23, 1895, his duties

as register of deeds requiring his almost daily presence in Dodge City. It seems to be well settled that it is essential to the exercise of the right to purchase Osage Indian land under the act of May 28, 1880, *supra*, that actual settlement thereon should be made with the *bona fide* intent on the part of the settler of making the land his home (R. H. Smith, 11 L. D., 268; and *Finan v. Meeker*, *Ibid.*, 319). It is not shown that Arment had any such intention; and this conclusion is reached after careful consideration of all the evidence, including the final proof submitted by him on July 15, 1895.

While, on the other hand, it must be conceded that Rowe has not manifested throughout that diligence, in his effort to acquire title to lot 1, which an ordinarily prudent man would have exercised, yet there is some excuse for his delay in the premises, and the equities of the case are, on the whole, in his favor. He was originally claiming both these lots—had declared for them, offered final proof and tendered payment. In pursuit of title to lot 2 he had carried a case to your office. No appeal from the decision of your office adverse to him as to lot 2 appears to have reached your office, or the local office, although prepared and in due time forwarded by the usual channel. Title to that lot has passed from the government. It is not involved in this controversy and it does not appear that Rowe is now claiming it. But seeking title, as he was, to both lots, and apparently feeling secure with the decision in his favor as to lot 1, if he in good faith believed, as it would seem he did, that he had an appeal as to lot 2 pending here, the reason for his delay is obvious. He hoped for a decision in his favor as to lot 2 and then to make entry for both lots. In law, if not in fact, he had an application on file to enter said lot, and which, being of record, segregated the land, when Arment began his proceedings to acquire title thereto. In view of Arment's failure to show due compliance with the said act, I am constrained to hold that the right of Rowe to the land in controversy is superior to the claim of Arment.

The decision of your office is reversed accordingly. The final proof of Arment will be rejected, and Rowe be allowed to make final proof for the land.

MINING CLAIM—MILL SITE—POSTING.

SILVER STAR MILL SITE.

On application for a mill site, in connection with a lode claim, the notice and plat should be posted on the mill site for the statutory period.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 28, 1897. (P. J. C.)

It appears that Dennis Kiely, executor of estate of John Fleming, made application for patent for the Charity and other lode mining claims, including the Silver Star Mill-site, lot No. 30 A and B, Salt Lake,

Utah, land district, and that the notice of application and plat were not posted on the mill-site.

By letter of February 17, 1896, your office required some additional proof in reference to some matters not in controversy here; also that proof be furnished that the plat and notice of application had been posted on the mill-site during the period of publication. In response to this demand the attorney for the applicant filed his own affidavit, in which he admits the notice and plat were not posted and that this was not done because he believed the law did not require the notice to be posted on the mill-site when applied for in connection with a lode claim. He asked that the requirement be waived and the matter submitted to the board of equitable adjudication, referring to the case of New York lode and mill-site (5 L. D., 513).

Your office, by letter of May 14, 1896, declined this request and ruled that applicant be allowed sixty days to begin republication, to be accompanied by reposting on the claim and in the local office; and claimant was also required to furnish evidence that the mill-site was used or occupied for mining or milling purposes. Thereupon the applicant appealed.

It is shown by the return of the surveyor that there were no improvements on the mill-site and that it was over 13,000 feet from the Silver Star lode; that it is situated

at the headwater of Cherry or Government creek and at a spring known as Indian Spring, It is the intention of claimants to pipe the water to their consolidated claims, a distance of about four miles.

Section 2337 of the Revised Statutes provides that a mill-site may be patented with a lode claim, "subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes;" and paragraph 66 of the mining circular requires that

a copy of the plat and notice of application for patent must be conspicuously posted upon the mill-site as well as upon the vein or lode for the statutory period of sixty days.

There was clearly not a compliance with the law and regulations in the case at bar, and, the mill-site being at such a distance from the lode claim where the notice was posted, and there being no improvements on it by which it might be associated in any way with the lode claim, it would seem as if this was not such a case as can be referred to the board of equitable adjudication.

In the New York Lode case, cited by counsel, it is shown "that claimant now owns two lodes contiguous to this mill-site, and has expended considerable sums of money on each, and cannot successfully work them without this mill-site." It will be seen that the conditions that pertain in the case at bar are quite different from those that apparently controlled in that case.

Your office judgment is therefore affirmed.

MINERAL LAND—SCHOOL GRANT—EVIDENCE—BURDEN OF PROOF.

STATE OF WASHINGTON *v.* MCBRIDE.

In proceedings arising between a mineral claimant and a State claiming under the school grant, where the character of the land involved is in issue, and the evidence submitted by the parties is unsatisfactory, and the Secretary of the Interior, on his own motion, with due notice to the parties, directs a mineral expert, of his own designation, to examine the land, and thereafter appear before the local office and testify under oath as to the result of such investigation, with full opportunity given for cross-examination, and no objection is made to such direction of the Secretary, until after its full execution, but acquiescence therein is manifested by the designation of a particular portion of the land for examination, the testimony of such expert, so given, may be properly considered together with the other evidence in the case.

If the presumptive mineral character of land is based upon the exploration of only one portion thereof, the burden assumed by one who alleges the agricultural character of such land is sustained by evidence of exploration on the same portion, sufficient to demonstrate the fact of its non-mineral character, and thereby overcome the effect of the alleged prior exploration and discovery.

Secretary Bliss to the Commissioner of the General Land Office, August
(W. V. D.) 27, 1897. (G. C. R.)

This case involves the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 16, T. 20 N., R. 3 E., Olympia, Washington.

February 25, 1890, John G. McBride filed mineral application No. 18, for the land in question, embracing six placer locations, of twenty acres each, all located September 23, 1889, and thereafter sold by the locators to McBride. His application for patent was met by the protest of the State of Washington filed during the period of publication.

This protest asserted that the land was a part of the State's school grant, that it contained no valuable mineral deposits, that the mineral application was not made in good faith for the purpose of securing the land as a placer mine, but for the purpose of acquiring title thereto on account of its greater value as suburban property. The land adjoins the city of Tacoma on the south, and the protest places the value thereof at more than \$1000.00 per acre.

Upon the hearing on the protest, a very large amount of evidence was taken, relating to the alleged mineral character of the land, its comparative value for mining, agriculture, and town lots, the methods to be employed in extracting the gold from the ground, the cost and difficulty in conveying the requisite amount of water to the land for hydraulic mining, and also the obstacles to be overcome in disposing of the refuse or tailings, and in obtaining dumping privileges. This evidence, together with the testimony addressed to the State's allegation of fraud on McBride's part, made one of the largest records ever brought to this Department. The register and receiver held, February 3, 1892:

After a thorough consideration of the testimony we are convinced that the tract is entirely valueless as a mining claim. The tract, undoubtedly, contains particles of gold in small quantities, but the testimony in this case shows that gold, in a greater

or less quantity, can be found in nearly any gravel formation in western Washington, and that the tract in controversy is probably very little richer in mineral, than many thousands of acres of similar lands in this State. . . . Even were it shown that this tract under ordinary circumstances would be fairly valuable for mining purposes, still, we could not recommend the allowance of the application, considering the great difficulties that would be encountered and the immense amount of money that would be required to be expended in the operation of the mine.

On appeal, your office, by decision dated January 4, 1893, reversed that action, holding:

The testimony for the State is of a negative character, while that of claimant is affirmative and positive, therefore, the latter is entitled to the greater weight.

* * * * *

The preponderance of evidence shows that the land in controversy was, at the date of the admission of the State, known to bear gold, that as a present fact it exists there in paying quantities, and that water and a convenient dump with sufficient fall can be secured to successfully work the claim by the usual method, also that as a present fact it is of little or no value for agricultural or horticultural purposes, therefore, the land did not pass to the State, but is excepted from the grant and subject to disposal under the mining laws.

From that judgment the State appealed, and the Department on March 17, 1894 (18 L. D., 199), modified your said office decision and ordered a second hearing. The evidence produced at the first hearing was so conflicting and unsatisfactory that the Department declined to render a final judgment upon the record then before it. If McBride and his witnesses correctly represented the facts, the land was mineral in character, and was subject to disposal under the mineral laws; but if, on the contrary, the State's witnesses accurately disclosed the character of the land, it was not mineral and had passed to the State under the school grant. Both the purpose and the scope of the second hearing are shown by the following extracts from the departmental decision ordering the same:

The principal question in this controversy is, whether there exist upon the claim, as a present fact, deposits of gold, or other mineral, in paying quantities, by which must be meant such quantities as, in view of the physical difficulties to be overcome, would justify mining. It is shown that if such deposits do exist, it is only by the hydraulic process that the mine can be successfully worked.

Is such a process feasible in this case, and does it promise such results as would warrant its introduction?

The hydraulic process of mining is the more modern method. It is employed in California and other mining States. By this process great banks of gravel are washed down, the debris carried away in flumes, and the gold caught therein, by means of quicksilver and riffles (wooden blocks) placed in the upper part of the flumes. Gravel deposits, which would not pay wages by the earlier system of panning or rocking, are found very profitable in hydraulic mining where large banks of auriferous deposits are run through the flumes and the gold arrested. The employment of this process requires the use of an adequate supply of water, and a place for depositing the debris. Without these facilities, a placer mine of the character just described is practically valueless.

If it be admitted that gold exists on the claim in considerable quantities (a question hereinafter referred to), still, if it were shown at the hearing that it is impossible or even impracticable to obtain a sufficient volume of water for the necessary wash-

ing away of the gravel deposits, or a sufficient area of ground at a proper distance and depression on which to deposit 'tailings,' the mine would be valueless.

I think the evidence as a whole shows that a sufficient supply of water may be obtained, and the wisdom of making the necessary expenditure to obtain that supply depends entirely upon the richness or character of the mine.

The same considerations obtain as to the question of the disposition of the debris from the mine.

All the difficulties so earnestly and ably urged can be overcome, if the gold exists in anything like the quantities alleged.

The single question of the value and extent of the alleged deposits remains to be determined, and a hearing for that purpose is necessary.

The land should be thoroughly prospected, When the tests are completed, the State, having the burden of proof to show the non-mineral quality, will present its testimony, after which claimant may offer his testimony in rebuttal and, in addition thereto, any further testimony he may have to sustain his averments as to the mineral quality of the land.

The second hearing was had before the register and receiver and lasted from the 5th to the 26th of September, 1894. The evidence taken at this hearing is also voluminous and has greatly increased the already bulky record in the case. Upon this hearing the local office, on November 17, 1894, recommended that the protest of the State be dismissed, saying:

When we take into consideration the fact that the burden of proof as to the non-mineral quality of the land is upon the State and that the State in order to establish its claim must show the non-existence of mineral in such quantities as to justify expenditures in the effort to extract it, hence we are constrained to find that the State, though it has used extraordinary effort and expense and has brought on the witness stand a very learned geologist and mineralogist and expert assayist, and has with pains and care tabulated the results of its investigations, and presented its side of the case with learned and painstaking attorneys, has failed to establish the fact that the land involved is non-mineral in quality. It is a well known fact that though the science of mineralogy and geology has progressed to an advanced state, yet the element of chance has by no means been eliminated in practical prospecting and mining and it is the rule rather than the exception, that where a large number of men may prospect the same territory some may find 'pay-dirt,' while a far larger number will fail, and we must bear in mind that in the present case the State was assiduously looking for something that it was not to its interest to find, and that while the most of its investigations showed very small results, yet more or less gold was found, and is it not probable the small results of gold were due to chance or failure to go deep enough to where the investigation showed the richer deposits were?

On appeal, your office, by decision dated February 5, 1895, affirmed that action, saying:

By the order directing the hearing the State was advised that as the party contestant it devolved upon it to show that the land applied for is in fact non-mineral in character.

In order to do this it is necessary to show that gold does not exist on the claim,

and each location thereof, in such quantities, as, in view of the physical difficulties in obtaining it, would under the circumstances, render it profitable to mine the same.

* * * * *

All the evidence in this case together with the exhibits submitted, and the briefs and argument of counsel have been carefully considered, and I conclude that contestant, has failed to overcome the presumption attaching to the mineral application herein.

A further appeal brought the case here.

The evidence produced at the two hearings, by the respective parties, was contradictory in the extreme. Attempts were made by each party to discredit the explorations made, and the evidence offered by, the other. It was impossible to reconcile these conflicts upon the theory that both parties were acting in good faith and that the witnesses were endeavoring to tell the truth as they understood it. In view of this highly unsatisfactory condition, and considering the danger of arriving at and announcing a conclusion which would not be according to the real facts, Secretary Smith, on June 15, 1895, while the case was being considered upon the record then made, temporarily suspended such consideration and upon his own motion directed Mr. Waldemar Lindgren, assistant geologist in the Geological Survey, to proceed to the land in question, examine the same and give the result of such examination. This direction was made in the following letter of instructions:

WASHINGTON, June 15, 1895.

W. LINDGREN, Esq.,
Geological Survey,

SIR: You will proceed to Tacoma, Washington, and there make an examination of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, Sec. 16, T. 20 N., R. 3 E., Olympia land district, in said State, upon which John G. McBride filed mineral application No. 18, February 25, 1890. You will investigate the six locations (twenty acres each) on said lands by taking material from the undisturbed ground, at different elevations on each location. You will take such an amount of the material from each of said locations as will enable you to ascertain the character of the alleged mine, and to give an opinion as to whether or not the material is sufficiently rich in auriferous deposits to yield a profit to the miner. To ascertain this fact, you will, without aid or interference from others, take the undisturbed gravel from different elevations on each of the six locations, pan the material so taken, save the concentrates, and determine therefrom (by assay, if necessary) the amount and character of the gold per cubic yard of the material so treated. You will keep the results found on each location separately, and make such memoranda as will enable you to state at what elevations the material was taken, how much gravel was panned from each location, and how much gold was found. You will also summarize the results, to enable you to give the general average as to the number of cents of gold per cubic yard of the whole amount of material treated.

You are authorized to employ a sufficient force of laborers to assist you in the removal of the debris from the face of the gravel to be examined, but in all cases you will personally remove from the ground the material for examination and will, unaided, pan the results, and determine the values. No one should be permitted to be in such close proximity as to make it possible to cast a doubt upon the results reached, and if, in any case, by accident or design, you find that any one has had an opportunity to falsify the results, you will take no cognizance of the material then being treated, and obtain new gravel for further examination.

When you shall have completed the investigation of the alleged mine, you will give testimony before the register and receiver of the results found, as per these instructions.

You will also give five days' notice to McBride, and also to the representatives of the State, as to when your testimony will be given. After you shall have submitted your testimony, full opportunity will be given both sides for cross-examination.

When completed, the testimony will be at once forwarded direct to this Department, to be considered with the record now made.

Very respectfully,

(signed) HOKE SMITH,
Secretary.

Full notice that this action was contemplated had been theretofore given to both parties by the Secretary's letters of June 6, to their respective attorneys, and a copy of the letter of instruction of June 15, was seasonably transmitted to such attorneys. Notwithstanding this notice, no protest against, or objection to, the proposed action was made by either party until after the Secretary's directions had been fully executed, as hereinafter shown.

Complying with his letter of instruction Mr. Lindgren began his examination of the land in question July 10, and completed the same July 24, 1895. After giving the requisite notice thereof, as directed in such letter of instruction, Mr. Lindgren, on July 29, appeared before the register and receiver at the local land office and gave testimony concerning his examination of the land and the results thereof. At that time both parties were represented by counsel. Mr. Lindgren, after being duly sworn, and in the presence of such counsel, testified that in pursuance of his letter of instruction he had made an examination of the land in question, had embodied the results of that examination in a written report, and, producing such report, stated that it contained a true history and account of such examination and its results. This report was then received in evidence without objection and, after some cross examination by counsel for the State, the record recites:

Thereupon the attorneys for the respective parties having no further questions to offer, the taking of testimony is closed.

The testimony of Mr. Lindgren, with the accompanying report, was then transmitted to the Department to be considered with the record theretofore made. The more material portions of this report are as follows:

GENERAL RESULTS.

The land in question . . . contains only an extremely small amount of gold and is of no value for mining purposes:

TOPOGRAPHY OF THE CLAIMS.

The claims are laid out on a roughly level plateau whose surface is approximately 350 feet above sea level and rises southward. Two V shaped gulches extend northward; one the middle gulch traversing the six claims not far from their eastern end,

the other, the west gulch, skirting the western ends of claims No. 1 and 2 and 5 and 6 only. The surface of the plateau is composed of coarse gravel and sand. The thickness of this stratum and the character and thickness of the subjacent materials are to be observed only in the steep slopes of the two gulches or in shafts sunk for the purpose. At the northern edge of claim No. 1 the middle gulch is about 150 feet deep. The lowest bed visible on the claims is seen at this point in the tunnel 1, by the lower dam. The steep slopes of the middle gulch afford ample opportunity for ascertaining the character of the deposits above this.

* * * * *

TESTING OF THE GRAVEL DEPOSITS.

The method employed has been that of drifting, at different elevations, short distances into the hill-sides until undisturbed strata were reached. The tunnels are from four to ten feet long and five to six feet high. Usually no trouble was experienced in finding undisturbed strata, though the formations include quicksand, and land slides have occurred. I adopted the method of sampling which I would have used if requested to determine the value of the claim for a prospective investor; but I sampled the claims much more thoroughly and have been more scrupulously careful in panning than would have been necessary simply to ascertain the value for a purchaser. Both the middle and west gulches have been tested in this manner. Most of the earlier developments were made along the middle gulch and in this the majority of my tunnels also are located. The positions of the drifts have been chosen with care fully to represent each claim, thoroughly to cover the entire workable thickness of gravels and fairly to test again localities worked in previous investigations.

Thirteen of my tunnels are located on claim No. 1 which offers the best and deepest exposures of the auriferous material. Of these thirteen, Nos. 1, 28, 29 & 30, are located one above another between the old tunnel at the dam and the State's shaft No. 2. Three others, (Nos. 2, 3 & 4) were driven further south on claim No. 1 in the cut from which Mc.Bride took 870 cubic yards of gravel. Two tunnels, (Nos. 5 & 6) were located still on claim 1 higher up on the western slope and one, (No. 37) in the top gravel on Pacific Avenue. Three tunnels were located in the west gulch at high, middle and low elevations.

On claim No. 2 there are six tunnels; Nos. 7 & 8, are near the pump house of the hospital in the bottom, Nos. 9 and 11 are about 30 feet above the stream on the west side, No. 12 is high up on the eastern side—all in the middle gulch, and 34 on the west gulch.

Claim No. 3 contains six tunnels located in the middle gulch, as shown on the map, (Exhibit Nos. 4 & 5). Claim No. 4 contains six tunnels as shown on the map. Claim No. 5 contains three tunnels, as shown on the map, one of which is located on the west gulch. Claim No. 6 contains four tunnels, as shown on the map, one of which also is located in the west gulch.

METHOD OF SAMPLING.

All samples were taken to represent the entire face of the tunnel freshly exposed by myself. With a small pick I loosened the gravel or sand, and caught it in the pan, from which I poured it into strong canvass bags. I took all the material represented in the face, and all kinds proportionately to their occurrence, without selection, except that where two or more strata appeared the samples of each were usually kept distinct and separately noted. The samples were carried to the panning place in the canvass bags by myself and my assistants under my supervision. The openings, the samples, and the sample bags and pans were constantly so guarded that no one could have fraudulently influenced the result. But throughout the examination of the claims, there has been no ground for suspecting such an attempt.

METHOD OF WASHING.

All the pans were carefully washed by myself. The tailings from the last part of each pan were caught in another pan and washed over again to guard against possible loss. In three instances only was a color found in the tailings. The extremely small size of the colors usually obtained attests the reliability of the panning, and it is not possible that any larger colors could have escaped notice. The results from each pan were noted separately. In all, 211 pans were washed from 37 openings.

CHARACTER OF THE GOLD.

Only one kind of gold has been found. It is extremely fine, floury, and flaky and will easily float on water when dry. The largest color found weighed about 0.05 of a milligramme or 0.004 of a cent, and the smallest colors are almost of microscopic size. The average size calculated from the assays is 0.015 of a milligramme, or 0.001 of a cent. The largest yield found in any one pan was at the rate of 0.8 of a cent per cubic yard. The largest yield in any tunnel was from No. 36 on claim No. 5, west gulch, where gold at the rate of 0.227 of a cent was found in five pans, or from No. 12 on claim No. 2 where the yield may have been nearly 0.3 cents per cubic yard, as explained in the tests.

The report then states in detail the location and elevation of each tunnel, the character of the gravel or dirt found, the quantity of material panned, and the amount of gold therein; after which the report proceeds:

Summary.

Claims.	Tunnels.	Pans.	Colors.	Values determined.
1.....	12	80	35	0.004 cts. per cubic yard. 0.110 " " " " " 0.080 " " " " " 0.020 " " " " "
2.....	6	35	21	0.150 " " " " "
3.....	6	26	18	0.130 " " " " "
4.....	6	32	14	0.066 " " " " "
5.....	3	18	15	0.227 " " " " "
6.....	4	20	15	0.130 " " " " "
		211	118	

These results show a fairly regular proportion of approximately one color to every other pan. Such a comparative uniformity of the results indicates a general distribution of the gold present and the absence of rich paystreaks. The average value per cubic yard represented by these samples could be calculated from the data given above, were such a determination worth while. It is clearly apparent from the results that this average value is considerably less than one cent per cubic yard; it probably lies in the neighborhood of 0.1 of a cent per cubic yard. The lowest value at which a claim in this situation could profitably be worked is about 5 or 6 cents per cubic yard.

In a gravel mass of this kind each gulch acts as a concentrating apparatus or a sluice and in the bottom of it somewhat richer gravel may be found as secondary accumulations. In considering the tenor of the whole mass these small secondary concentrates are of no importance.

After referring to the geological formation of this land and the surrounding country, the report proceeds:

All of these geological considerations bear out the results stated above as to the character and amount of gold found. They tend to confirm the conclusion that the

claim does not contain gold in sufficient quantities to justify mining. Aside from all theories, however, this conclusion is one of fact definitely proved by the number and character of the samples, the results of panning and the care taken to insure correct results.

On October 15, 1895, McBride, through his counsel, protested in writing against the consideration of this report of Mr. Lindgren, contending in effect: First, that an *ex parte* investigation and report should not be received and permitted to change the preponderance, or affect the legal force, of the evidence taken; second, McBride had not been permitted to show by competent evidence that the methods of investigation followed by Mr. Lindgren were crude, insufficient, and unreliable; and third, that the opportunity afforded McBride to cross examine Mr. Lindgren before the register and receiver was not equivalent to having a day in court and an opportunity to defend against such report when Mr. Lindgren

chose the places on the claims for testing the dirt, dug the dirt and tested it, without the right or power of McBride to see, interfere or object thereto.

Upon consideration of the report of Mr. Lindgren, the objections of McBride thereto, and the evidence theretofore taken in the case, Secretary Smith on November 30, 1895, issued the following second letter of instruction to Mr. Lindgren:

WASHINGTON, D. C., Nov. 30, 1895.

MR. W. LINDGREN,

Geological Survey,

SIR: On June 15, 1895, you were directed to proceed to Tacoma, Washington, and there make an examination of the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 16, T. 20 N., R. 3 E., Olympia land district, in said State, with reference to the character of an alleged placer mine thereon upon which John G. McBride filed mineral application No. 18, February 25, 1890.

You were directed to investigate the six locations (twenty acres each) on said lands by taking material from the undisturbed ground at different elevations on each location, and ascertain therefrom the character of the alleged mine, with a view to giving your opinion as to whether or not the material is sufficiently rich in auriferous deposits to yield a profit to the miner.

Specific directions were given you as to your methods of procedure, and you were directed to give testimony before the Register and Receiver as to the results found at the close of your investigation, after having given due notice of such examination to McBride and the State, with opportunity to both sides for full cross-examination.

It appears from documents now before me that, in pursuance of your instructions, you spent fifteen days in making an examination and investigation of said alleged mine, and that you appeared before the Register at Olympia, Washington, on the 29th day of July, 1895, and there gave your testimony in the presence of a representative of both the State and McBride. A report, dated July 27, 1895, prepared by you and addressed to the Secretary of the Interior, giving your method of testing the gravel deposits of the land, the general results reached, and your opinion of the value of the alleged mine, was submitted to counsel on each side, and, without objection, the same was admitted in evidence.

I have carefully examined this report, and find the same of much value in arriving at a true solution of the controversy. You appear to have examined and treated gravel from different elevations on the six locations, but in each instance the quantity treated (about five pails to the tunnel) is quite small, and the whole amount of

gravel examined (being 211 pans or $1\frac{1}{3}$ cubic yards), while conclusive as far as it goes, is yet too meager in my judgment to rest the case upon that limited quantity.

You will therefore immediately return to the land, and make further examination. Inasmuch as McBride claims to have taken 870 cubic yards of gravel from an open cut on claim No. 1, and obtained therefrom an average of $10\frac{1}{2}$ cents of gold to the cubic yard, you are directed to proceed to the same locality and there make additional investigations from undisturbed gravel in the same open cut. To avoid all misunderstanding as to the situation of said "open cut", you will give McBride or his attorney the privilege of designating that place, and its limits.

You will take not less than six cubic yards of gravel (working either in open cuts or tunnels as you may think best), so arranged as to obtain an average of all the material exposed between the lowest accessible level and the highest point of the cut as left by McBride and across its width.

You are authorized to employ a sufficient force of laborers to assist you in the removal of the debris from the face of the gravel to be examined; you are also authorized to employ a competent assistant, who, with yourself, will remove all the material from the ground for examination. Yourself and assistant will pan the material, save the concentrates, and determine therefrom (by assay, if necessary,) the amount and character of the gold per cubic yard of the whole amount of material (at least six cubic yards) so treated. If in your judgment greater accuracy may be reached by engaging the services of an assayer, you may make such engagement, but in that event he also must testify.

No one should be permitted to be in such close proximity as to make it possible to cast a doubt upon the results reached; and if in any case, by accident or design, you find that any one has had an opportunity to falsify the results, you will cast aside the material then being treated, and obtain new gravel for further examination.

When you shall have completed the investigation in the locality designated, you will give testimony before the register and receiver of the results found, as per these instructions. You will also give five days' notice to McBride or his counsel, and also to the representatives of the State, as to when your testimony will be given. After you shall have submitted your testimony, full opportunity will be given both sides for cross-examination. Your assistant, laborers, or attendants, and the assayer (should you elect to engage one), may be called by either side for examination. When completed, the testimony will be forwarded by the register to this Department to be considered with the record now made.

Very respectfully,

(Signed) HOKE SMITH, *Secretary*.

Notice of the issuing of this letter of instruction was seasonably given to counsel for both parties, but no objection to the contemplated action was made by McBride until after the Secretary's instructions had been fully executed, as hereinafter shown. Before this last direction was carried into effect, the State protested against the further exploration contemplated and requested that the order be so modified as to avoid the objection of the State thereto. This objection was substantially stated in a written protest as follows:

The claimant is given the privilege of designating the exact spot from which the gravel is to be taken and to mark its limits. Under these circumstances, we insist that it is impossible to prevent the fraudulent introduction of gold into the gravel to be examined without the possibility of detecting the fraud, excepting by the proof that the gold found in other places in the vicinity is of different character and of less amount.

This protest was duly considered but it was believed that the instructions contained in the order, would insure the examination of only

untouched gravel and the prayer for the modification was not granted.

The letter of November 30, 1895, authorized Mr. Lindgren to employ one assistant to aid him in making the required examination, but authority was later given by the Secretary for the employment of two assistants.

After complying with the last letter of instruction and giving the requisite notice to counsel for both parties, Mr. Lindgren appeared before the register and receiver at the local land office January 10, 1896, and gave testimony concerning his second examination of the land in question and the results thereof. At that time the State was represented by counsel but there was no appearance on behalf of McBride. Mr. Lindgren, after being duly sworn, testified that he had made the examination required by the second letter of instruction and had incorporated the results thereof in a written report; that the examination was impartially made and that the report contained a true account of such examination and the results thereof. The two assistants, John Malmberg and Joseph Medlyn, who aided Mr. Lindgren in this examination, were then sworn and testified, in substance, that they were experienced miners; that they had made a careful examination of this ground; that there was not sufficient gold therein to make a paying mine thereof; that they had read Mr. Lindgren's report and that it correctly stated the panning done by them. This evidence, with Mr. Lindgren's last report, was then transmitted to the Department to be considered with the record theretofore made. The more material portions of this report are as follows:

On Dec. 13 Mr. Paul de Heirry, local counsel for McBride met me and proceeded with me to the locality to be investigated. The limits of the McBride cut he designated as follows: Beginning at tunnel No. 2, claim No. 1 of previous report and extending 30 feet nearly due north along the bank on the west side of Gallaghers Gulch. The lowest place he fixed in the bottom of the cut, which is separated by an 8 foot high narrow ridge from the creek, and which had very nearly the same level as the creek. This lowest level is 8 feet below the floor of the old tunnel 2, the elevation of which was fixed in the former report at 210 feet above the sea. Regarding the upper limit of the cut, Mr. de Heirry was in some doubt but thought it might have extended up as far as 11 or 12 feet above the tunnel referred to. This would make the total height of the cut 18 or 19 feet. If the cut extended up as high as this it must originally have had a roughly triangular shape, most material being taken from the lower level, and least from the highest.

METHOD OF WORK.

I determined to open the cut by means of three tunnels drifting from 10 to 15 feet back in the solid bank and then branching to the right and left, in order to obtain complete samples of the whole extent of the cut. It was decided to take most material from the lowest tunnel, somewhat less from the second and least from the highest and third, as very little, if any, gravel could have been obtained from that level. The location of the tunnels and the place and amounts of sample taken, in pans, are noted on the map attached to this report, (Exhibit "A"). The tunnels are located close together, with a vertical distance of 6 or 7 feet between each; the height is not less than 6 feet, the average width 2 feet 2 inches. The location of

the tunnels and the general aspect of the place are illustrated by a photograph (Exhibit "B"). The lowest tunnel is referred to as "A", the middle as "B", and the highest as "C". In all about 100 feet of tunnels were run, progress being rapid and no timbering necessary, except in the approach to "A". Nobody but myself and my two assistants was allowed to enter the tunnels and at night time they were closed by a door and securely locked.

METHOD OF SAMPLING.

When the tunnels had been driven to a place at which it was decided to take a sample the face was squared up and the bottom cleaned. Then the gravel was picked down evenly over the whole face, the material shovelled into a wheelbarrow, taken out to the panning place just outside of the tunnels and washed. Where the tunnel carried water a suitable piece of wood was placed in front of the sample so as to guard against any gold washing away.

METHOD OF PANNING.

The panning was done by myself and my assistants in the most careful and pains-taking manner possible. The concentrates of *each pan*, were examined so as to make absolutely sure of the character, size and number of colors obtained. The colors were not counted, but notes were taken of the approximate average numbers found. The colors found were brushed off with some black sand and the rest of the black sand repeatedly examined for colors. The concentrates from the three tunnels were kept separately, and afterwards by slow and careful work re-concentrated to a small bulk, consisting of about one-tenth gold (in volume) and nine-tenths black sand.

A test of six cubic yards means a practical working test. To wash these six cubic yards by the pan means the use of the most accurate method known for saving placer gold—a method by means of which practically all that the gravel contains can be saved; in rockers or sluices a large percentage of the finest colors are invariably lost.

METHOD OF DETERMINING THE GOLD.

To collect and weigh the gold by simply separating it by water from the black sand is well nigh impossible, as the dry colors form almost impalpable dust or minute flakes very apt to be lost and all floating easily on water. This being a practical working test I thought it suitable to employ the process mostly used in practice, i. e., the amalgamation. The amalgamation was done by myself in the laboratory of Mr. C. E. Bogardus, City Chemist of Seattle, with results as stated below.

To each sample of black sand and gold a little water, quicksilver and a drop of hydro-chloric acid was added; it was then ground lightly until all of the gold had been taken up by the quicksilver; then the quicksilver was separated and the black sand examined for gold and finely divided quicksilver with the most scrupulous care and not laid aside until perfectly pure. Finally the amalgam was dissolved in nitric acid and the residual gold weighed.

TUNNEL A.

The lowest tunnel was started near the northern end of the cut one foot lower than the lowest point indicated by Mr. de Heirry. Its direction and the samples taken are indicated on Exhibit "A". The grade of the tunnel is very slight. The elevation of the floor is 201 feet. The height of the tunnel near the entrance is 7 feet 2 inches, further in a few inches lower. The first sample was taken twelve feet from the entrance. The material is a pretty firmly consolidated gravel, not at all

cemented, however; at intervals small streaks of sand were found. The total length of tunnel with its branches is 49 feet; total amount of gravel removed about $24\frac{1}{2}$ cubic yards, of which $3\frac{1}{2}$ were panned, a proportion of about 7 to 1. The samples from this tunnel contained more gold than those from the upper tunnels and the average number of colors to the pan was estimated to be between one and two. The gold was mostly in form of minute extremely light flakes, of bright color.

Table of Pannings.

	Lindgren	Malmberg	Medlyn	Total.
Dec. 20 a. m.	14	14	12	40
" 20 p. m.	10			10
" 21 a. m.	16	18	14	50
" 21 p. m.	15	8	7	30
" 22 a. m.	27		23	50
" 22 p. m.	17		15	32
" 23 a. m.	16	18	19	53
" 23 p. m.	14	8	13	35
" 24 a. m.	20	23	24	67
" 24 p. m.	11	11	11	33
" 25 a. m.	23	22	22	67
" 25 p. m.	16	6	14	36
	201	128	174	503

Reduced to cubic yards 3.3.

In the concentrates from this tunnel a total of 5.6 milligrammes gold were found, equivalent to 0.37 of a cent or 0.11 of a cent per cubic yard.

Gold shown in vial (Exhibit "D")

TUNNEL B.

The second tunnel was started 7 feet 2 inches higher than the first, and driven in a nearly parallel direction. The height was 6 feet 2 inches. The direction of the tunnel, as well as the amounts (in pans) and the localities of the samples are indicated on Exhibit "A." The first sample was taken 14 feet from the mouth. The material is chiefly sand with smaller strata of gravel at the bottom and near the top. The total length is 44 feet; total amount of material removed 22 cubic yards; of this 2.8 were panned, a proportion of about 8 to 1. The gold obtained from this tunnel was much less in quantity than that from tunnel A and generally of extremely fine, floury character; the average amount of colors was estimated to be one per two pans.

Table of Pannings.

	Lindgren	Malmberg.	Medlyn.	Total.
Dec. 27 a. m.	29	11	18	58
" 27 p. m.	21	15	17	53
" 28 a. m.	19	15	26	60
" 28 p. m.	20	20	20	60
" 29 a. m.	19	16	15	50
" 29 p. m.	24	21	20	65
" 30 a. m.	26	11	13	50
" 30 p. m.	13	10	9	32
	171	119	138	428

Reduced to cubic yards 2.8.

In the concentrates from this tunnel a total of 1.5 milligrammes of gold were found, equivalent to 0.1 of a cent or 0.036 of a cent per cubic yard.

Gold shown in vial (Exhibit "E").

TUNNEL C.

As already noted there was no probability that any large amount of gravel had been taken from this level, and it was not thought necessary to take as large and extensive a sample from it as from the lower levels. The tunnel was started 6 feet 9 inches above tunnel B, and driven in a westerly to northwesterly direction. The first sample was taken six feet from the mouth and the others as indicated. The material is a sandy gravel with large cobble stones, containing very little black sand. The total length is 20 feet; total amount of material removed about 9 cubic yards, of which 1 cubic yard was washed. Only six colors, all very small, were obtained from 154 pans.

Table of Pannings.

	Lindgren.	Malmberg.	Medlyn.	Total.
Dec. 30 p. m.	7	7	5	19
" 31 a. m.	25	25	20	70
" 31 p. m.	23	20	22	65
	55	52	47	154

Reduced to cubic yards 1.

In the concentrates from this tunnel a total of 0.1 milligramme of gold was found, equivalent to 0.0066 of a cent per cubic yard.

Gold shown in vial ("Exhibit F").

Summary.

	Cubic yards washed.	Cents per cubic yard.
Tunnel A	3.3	0.111
" B	2.8	0.036
" C	1	0.007
	7.1 averaging	0.057 of a cent.

It follows from the data given above that the gravel and sand from the so-called McBride cut is absolutely worthless for mining purposes. It has already been stated that only one kind of gold—very fine, flaky or floury—has been found and it may be added that not one of the colors obtained would weigh 0.004 of a cent, the size of the largest one found during the investigation of last summer. Gold of this character may be saved in a pan but only a small portion of it could be caught in sluice-boxes, so that if the gravel did contain 10 cents per cubic yard of this kind of gold, not one tenth of it could be obtained by the ordinary manner of washing on a large scale.

In the instructions it is stated that McBride sluiced 870 cubic yards of gravel from this cut, and alleges to have obtained therefrom an average of 10 $\frac{3}{4}$ cents of gold per cubic yard or a total of \$92.80. The results of this examination indicate beyond doubt that the gold was not derived from the undisturbed gravel of this cut.

While McBride did not avail himself of the opportunity to be present at, and participate in, the taking of the testimony of Mr. Lindgren at the local office on this second occasion, he did affirmatively acquiesce in the last letter of instruction to the extent of designating the ground which should be examined and tested by Mr. Lindgren, pursuant thereto.

Since the receipt of the reports of Mr. Lindgren, the case has been orally argued, McBride earnestly protesting that neither report should be considered. In this connection it is proper to briefly recall the situation which led to the order of Secretary Smith directing that an examination of the land in question be made by Mr. Lindgren, as an expert. The two hearings had been had before the local land office. The evidence presented in the record was voluminous and contradictory. The land in question was originally public land of the United States, and being surveyed and a part of section 16, it had passed to the State of Washington unless it contained valuable mineral deposits. If mineral in character, it was excepted from the grant to the State and McBride was entitled to purchase it under his mineral application. It thus became the duty of the Secretary of the Interior to determine the character of the land, and the rights of the State and McBride thereto. Secretary Smith, in the discharge of this duty, and in the exercise of his discretion, ordered that the land be examined by a competent and impartial expert of his own selection and suspended further consideration of the case until this could be done. Prior notice of the contemplated order was given in writing to both parties, and when the order was made, a copy thereof was seasonably transmitted to each party.

The report of the expert was not to be a secret one but was to be fully disclosed, under oath, at a public hearing before the local office, timely notice of which was to be given both parties and full opportunity afforded for cross examination.

The testimony of the expert was not to be given exclusive influence in the decision of the case, but was to be considered with all the other evidence.

No complaint of partiality or incompetency has been lodged against the expert selected.

The second order was like the first, excepting that it directed that an additional examination be made at the very place from which McBride claimed to have obtained the richest gravel, and permitted McBride to designate this place and define its limits.

The opportunity for full cross examination provided by both orders readily enabled McBride to inquire into the methods of investigation followed by Mr. Lindgren, the bases for his conclusions or opinions, his experience, qualifications and any other matter which would affect the force to be given to his testimony, but this opportunity was not accepted by McBride.

If there be any real objection to the orders of Secretary Smith, it is that opportunity was not given to meet this new expert testimony and show any infirmity therein by other and rebutting evidence, but no modification of either order in this respect was ever requested. It is not now necessary to consider the merits of this objection, nor whether it has been waived by failure to seasonably seek such modification,

because at the oral argument which was had before the Department, counsel for McBride were expressly asked whether, in the event it was deemed proper to consider the reports of the expert, they desired an opportunity to present any evidence in opposition thereto. To this the answer was that they did not desire to present any other evidence but requested that the case be now determined upon such evidence as might be held to be properly before the Department.

Under these circumstances, I have no hesitancy in holding that both reports of Mr. Lindgren should be considered and weighed with all of the other evidence, in determining the case.

The remaining and principal question is whether the land in question contains valuable mineral deposits such as will yield to the miner a profit for their extraction.

On this point the evidence is conflicting. Your office and the local office concur in finding that the land is mineral in character and subject to sale as such. These concurring findings—the evidence being conflicting—are entitled to great consideration and should not be rejected unless a mature and careful examination of the entire record clearly demonstrates that such conclusion is wrong.

Without entering *in extenso* into a discussion of the evidence, but considering all that was produced at the two hearings, it is entirely clear that in the prospecting of the land in question to determine the mineral quality thereof, the State employed more men, sunk more shafts, sunk them to a much greater depth, and generally did more in the way of exploration than was done by the mineral claimant. The prospecting by the State was also more generally distributed over the land than was that by the mineral claimant. The witnesses for the State appear to have been as competent and as impartial as those for the mineral claimant, but neither the methods nor the evidence of either party is entirely free from criticism. The immediate proximity of the land to the city of Tacoma, and its great value by reason thereof, have not lessened the efforts of either party to obtain final title thereto. The price of land under the placer mining law is \$2.50 per acre and this, contrasted with its value as suburban property, may have furnished a motive for the prosecution of the mineral claim.

The character of a tract of land can not be wholly determined by reference to the surrounding land, and yet the mineral quality of such surrounding land is, at least in cases otherwise doubtful, a proper subject for consideration. The section of country in question has long been settled and occupied by a large population and yet none of the land in that vicinity has ever been entered under any of the mining laws, and no kind of mining has been, or is being, successfully prosecuted there.

In the departmental decision of March 17, 1894, *supra*, it was held, as before shown, that the burden of proof was on the State and it was directed that the second hearing proceed on that line. Without now

affirming or disaffirming this holding, it is sufficient to say that it thereby became the law of the case for your office and the local office. The State made no effort to obtain from the Department a modification of the decision in this particular, and it was not competent for your office, or the local office, to make a modification thereof or to depart therefrom. It may be, however, that the direction as to the burden of proof has been somewhat misunderstood and misapplied. The holding of the Department was that the mineral locations and the return of the deputy mineral surveyor gave to the land a mineral character, not conclusive but *prima facie*, and cast upon the State the burden of overcoming the same. The task of sustaining this burden was necessarily affected by the extent of the exploration and discovery which supported the mineral locations and the deputy mineral surveyor's return. It was by reason of such exploration and discovery that a mineral character was impressed on the land and the force of this impressed character is necessarily measured by the extent and nature of its support. If the mineral character of a claim is founded upon the exploration of only one portion thereof, the burden thereby cast upon one attacking the mineral location is sustained by evidence of exploration on that same portion sufficient to demonstrate its non-mineral character and thereby overcome the alleged prior exploration and discovery. That which has given a mineral character to the entire claim being thus shown to be unfounded and thereby destroyed, the mineral character is removed; the support being destroyed that which was supported goes with it. In such a case it would be unreasonable to also require that the non-mineral claimant should make actual and physical demonstration of the non-mineral character of that portion of the claim which has never been explored or tested by the mineral claimant.

This land not being in a mining region and the same having been returned as non-mineral by the public survey, and having been originally classed as non-mineral in consequence thereof, it is doubtful whether the Department in placing the burden on the State intended to require that the State should more than overcome and destroy the effect of the subsequent mineral locations and mineral survey. Certainly it was not a condition to the State's success that it should by actual working and mining of all of the ground in question at and below the surface make a physical demonstration that there was no valuable mineral in any part thereof.

What has been said respecting the burden of proof is called forth by some portions of the opinions of the local office and of your office which seem to have expressed the belief that under the direction of the Department on that subject it devolved upon the State to show that the land is in fact non-mineral and that any ground not actually penetrated and explored by the State and thereby demonstrated to be without valuable mineral deposits should be held to be mineral without regard to whether it had ever been penetrated and explored by the mineral claimant.

It is not clear whether the decision of the local office of November 17, 1894, and the decision of your office of February 5, 1895, were based upon a consideration of all of the evidence taken at the two hearings theretofore had, or whether they were based solely upon the evidence taken at the second hearing.

The extent and nature of the exploration and discovery and the deputy mineral surveyor's return, upon all of which the mineral claim herein is predicated, were shown by the evidence produced by the mineral claimant at the first hearing, and a statement thereof is made in departmental decision of March 17, 1894, *supra*, so that it need not be here repeated. At the second hearing, while introducing some evidence of more recent prospecting and exploration, the mineral claimant rested largely upon the evidence produced at the first hearing. As stated in the first departmental decision, it was then asserted by the mineral claimant that the deposit of gold was general throughout the various portions of the claim and that the value of the claim was \$3,240,000 on the basis of 18,000,000 cubic yards of available material having a mineral value of 18 cents each.

The evidence produced by the State at the second hearing disclosed the nature and extent of the prospecting and exploration done by the State preparatory to that hearing. This work consisted in the sinking of eight shafts on the six claims, being at least one shaft on each claim, and the running of a tunnel from the middle gulch twenty-four feet into the bank of claim No. 1. These shafts penetrated the ground to lower levels ranging from 60 to 124 feet below the surface, and the tunnel was run from the lowest level of the gulch which was about 150 feet below the surface. The material removed from the shafts and tunnel was all fairly sampled and tested and was shown to carry less than one cent of gold to the cubic yard. In considering this evidence your office decision says:

I am satisfied that down to the level of greatest depth reached by State's witnesses, in any of these shafts, there is no gold in paying quantities on any of the six locations.

Excepting that the decision erroneously gives 101 feet as the level of greatest depth, instead of 124 feet, I fully concur in the conclusion so expressed. The evidence of the State to the effect that there is no gold in anything approaching paying quantity down to the 124-foot level, is so clear and so convincing that it not only overcomes but entirely overwhelms the evidence of the mineral claimant relating thereto. The shock thus given to the prior claim and evidence of the mineral claimant by the State's demonstration of the almost barren character of the claim to that depth, is now attempted to be avoided by the assertion that the mineral value lies below that level, and this despite the fact that mineral claimant's principal witness at the first hearing testified that on this land the gravel in the higher levels carries the most gold.

The excavation of the State's shafts was generally arrested by water found at the depth reached, but on reaching water in one shaft a well-borer with a six-inch tube was employed, by which the work was prosecuted to a depth of more than 180 feet below the surface. It is urged by McBride that the use of this well-borer in earth saturated with water, was not a fair method of testing the mineral quality of the ground. While this contention is probably correct, the result of this experiment is otherwise shown to be entitled to but little weight and cannot be invoked by either party.

The other work of exploration by both parties, was that of panning gravel and dirt taken from the bottom and along the sides of the gulch, and the sinking of shallow pits in, and the running of tunnels from, the lower portions of such gulch. Here, as elsewhere, the evidence is conflicting, but in this instance the conflict is more difficult of solution. This gulch was formed by the action of water. The washing down of the gravel has tended to concentrate toward the bottom of the gulch all the heavy material, so that what is in the lower portions thereof is largely the concentrates from the gravel above. A considerable portion of the gold which was so sparsely scattered through the entire body of gravel so washed down, may be, and probably is, embodied in this concentrated material so that it furnishes no standard for determining the mineral value of the great body of undisturbed gravel and earth in the claim.

The State has at all times claimed that where the surface and disturbed material in the gulch is penetrated, the untouched gravel so reached does not carry sufficient gold to pay for its extraction by any method, and that there is no appreciable difference in the amount of gold carried by the gravel in the different levels. This claim is supported by the State's evidence describing the prospecting, by its witnesses, in the gulch and giving the result of the examination and testing of the material taken from the State's tunnel run on the lower level. Opposed to this is the evidence of considerable prospecting in that locality by the mineral claimant and the testimony of some of his witnesses, that 870 cubic yards of gravel taken by them from an open cut in the lower part of the gulch, yielded an average of $10\frac{3}{4}$ cents of gold to the cubic yard.

It was particularly in connection with this conflict that Secretary Smith directed that the land in question be examined by Mr. Lindgren as an expert, and especially that the undisturbed gravel on the face of said open cut should be carefully examined and tested, after the designation of the place and its limits by the mineral claimant. Mr. Lindgren's reports, or testimony, show that he faithfully followed the directions of the Secretary; carefully examined and tested undisturbed material at various points and levels along the gulch; and especially made a thorough examination and test of the undisturbed material at the point designated by the mineral claimant as the place where the

latter claims to have taken out a considerable amount of gravel. These reports bear no evidence of partiality, and the qualifications of Mr. Lindgren and the manner in which he performed his work are such as to give weight to his testimony. He says the land in question, including the lower levels and the place so designated by McBride, contains an extremely small amount of gold, less than one cent per cubic yard and has no value for mining purposes.

This fully corroborates and sustains the claim and evidence of the State. From all of the evidence, including the testimony of Mr. Lindgren, I am clearly of opinion that the land is not mineral in character, is not subject to disposal under the mining laws, and that it passed to the State under its school grant. The decisions of your office of January 4, 1893, and February 5, 1895, are hereby vacated with instructions to dismiss the mineral application.

PAYMENT—PRE-EMPTION ENTRY.

GILBERT SCUDDER.

The government should not be heard to say that the payment of the purchase price of a tract of land under the pre-emption law was prematurely made, and not accepted by the receiver in his official capacity, where a suit is afterwards brought by the government against said receiver, and his sureties, for the recovery of public moneys, unaccounted for, and the price of said land is included in the sum sued for, and said suit is compromised on the payment of a stipulated sum in satisfaction of the claims sued upon.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897.
(W. V. D.) (W. M. B.)

Gilbert Scudder appeals from the decision of your office, of date October 12, 1894, wherein he was denied the right to make entry for the land covered by his pre-emption declaratory statement No. 2758, filed March 31, 1885, to wit, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 13, T. 14 S., R. 26 E., Las Cruces land district, New Mexico, unless payment was made of the purchase price of the land involved.

Appellant alleges that payment in full of the purchase money in question has already been made.

The record submitted shows that final proof was made June 26, 1886, for the land covered by the above described pre-emption filing. Appellant further alleges that the register at the local land office demanded payment of the purchase money for the land claimed at the time final proof was offered and submitted, and that he paid the same at the time of submitting such final proof by turning over to James Brown, the receiver at the local land office, \$200.00 in surveyor-general's scrip, which is receivable in payment for public lands.

Receiver Brown having failed to account to the government for the

purchase money paid by Scudder, at the time and in the manner above described, wrote to Scudder after his retirement from office, as appears from your office letter, saying: "I am owing you \$200.00 in surveyor's scrip."

After holding that the showing made by Scudder as to payment by him to receiver Brown of the purchase price of the land in question was insufficient, your office decision contained further statement and ruling, as follows:

A protest was filed against the proof which was not finally decided until August 15, 1889, when the secretary's decision upon a motion for review was promulgated. The land was awarded to Scudder.

Further, no payment could have been legally received until after August 15, 1889, and any funds intrusted to Mr. Brown in 1886 were so intrusted as the agent of the claimant and not as the agent of the government. (6 L. D., 713.)

The decision appealed from does not appear to have been based upon all the facts as they appeared upon the records of your office prior to and at the date said decision was rendered.

With the papers constituting the record in this case is filed the affidavit of Eugene A. Fiske, United States district attorney, which shows that suit was brought on behalf of the government, in the United States district court for the third judicial district of the Territory of New Mexico, against receiver James Brown and the sureties on his bond for the recovery of public moneys received at the local land office by the said Brown and which were not accounted for. It further appears from said affidavit that the sum of \$200.00, which Scudder claims to have paid receiver Brown as purchase money for the land involved, was one of the items in the bill of particulars or statement showing the indebtedness of the said Brown to the government, which was sought to be recovered in the aforementioned suit, managed and conducted by the said Fiske on the part of the government, and which was never brought to trial but compromised by payment of a sum agreed upon to the government by the sureties of Brown.

The evidence upon that particular point is corroborated, as appears from an examination of the records of your office, by that furnished by an itemized statement contained in one of the abstracts embodied in General Land Office report No. 48,280 (division of accounts), dated April 26, 1890, which also shows that the said \$200.00 claimed to have been paid by Scudder was one of the items which went to make up the total indebtedness of \$3,793.02, as shown in said report to be due the government on July 20, 1889, by Brown, for the recovery of which the referred to suit was instituted.

It further appears from the General Land Office report No. 55,826 (division of accounts), dated March 28, 1893, that the suit for the above stated indebtedness of Brown was compromised by his sureties paying to the government the sum of \$1,286.38, in full satisfaction of the said receiver's indebtedness, and that Brown and his sureties were

discharged from any and all liability on account of Brown's indebtedness to the government.

It does not appear from any of the above referred to statements or reports upon what particular basis Brown's indebtedness to the government—made up in part of the purchase money paid by appellant—was adjusted or scaled, nor does it anywhere appear in the papers or reports appertaining to or connected with the referred to suit and compromise that the claim of the government against Brown and his sureties for the \$200.00 paid by Scudder was abandoned in the compromise and settlement between the government and said sureties, whereby the government acknowledged satisfaction in full for the moneys making up the different items in the statement or bill of particulars upon which suit was brought.

If it were true, as stated in your office decision, that the money paid by appellant was not due or payable at the particular time payment was made, in that it was paid at the time of presenting final proof, and before such proof was accepted or approved, yet in view of the subsequent suit by the government against the receiver and his sureties for this amount, among others, and the acceptance of a stated payment by the sureties in satisfaction of the claims sued upon, the government could not be heard to urge that payment was prematurely made or that the receiver accepted the payment in his personal capacity and not as the official representative of the government. (*Potter v. United States*, 107 U. S., 126.)

It is sufficient for the purpose of this case to know that the bringing of suit by the government for the recovery of the said \$200.00—it not appearing that there was an abandonment of its claim therefor in the compromise and settlement of Brown's indebtedness—was an acknowledgment or admission on the part of the government that the same had been paid to Brown in his official capacity, and was, furthermore, a waiver of the question as to whether or not said purchase money was paid at the particular time it was due and payable under law and regulations. It is accordingly held that the appellant Scudder is entitled to make entry of the land involved and receive final certificate thereon without any additional payment of the purchase price of said land, and it is therefore hereby ordered that such entry be allowed, and final certificate be issued to appellant, without such payment.

The decision of your office requiring Scudder to make further payment of the purchase price of the land claimed before allowance of entry and issuance of final certificate therefor, is hereby reversed.

PAYMENT—DESERT LAND ENTRY.

S. W. RUSSELL, ADMR.

Under the departmental regulations governing the submission of final proof, and making payment, the entryman is required to make such payment at the time of submitting proof, and it is the duty of the receiver to accept the money at such time; and the subsequent failure of said officer to account to the government for the purchase price of the land, so paid, will not defeat the right of the entryman to receive patent without further payment.

The cases of Walter Newton, 22 L. D., 322, and Francis J. Dysart, 23 L. D., 282, cited and modified.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897. (W. V. D.) (W. M. B.)

This is an appeal by S. W. Russell, as the administrator of the estate of Martin M. Mason, deceased, from your office decision of September 7, 1894, wherein was rejected the application of said administrator, to have the desert land claim initiated by Mason during his life time by declaration No. 716, filed January 22, 1889, for section 8, township 14 south, range 26 east, Roswell land district, New Mexico, passed to final entry without further payment on the purchase price of the land.

In their report of October 12, 1893, to your office, relative to the status of the desert land claim in question, the local officers say:

In the matter of desert land entry No. 716, of Martin M. Mason referred to in your letter "G" of September 3, 1893, Mason made final proof on said entry on the 16th day of November 1891, before A. A. Mermod, U. S. Commissioner at Eddy, New Mexico. The proof was held at this office for supplemental proof of reclamation and proof of water appropriation, both of which were furnished on March 9, 1893, The said final proof was not put on record.

Your office letter in reply to the report of the register and receiver contained statement as follows:

It is shown that Mason paid to Receiver Frank Lesnet at date of proof November 16, 1891, \$440.00 as purchase money on the final entry.

Said proof was held to be defective by your office, and the entryman was notified to furnish supplemental proof of reclamation and proof of water appropriation to cure said defects.

And in disposing of the case upon the state of facts as above recited your office held, and instructed the local officers, as follows:

As the money in the case now in question was merely deposited with Frank Lesnet, and has not been accounted for nor covered into the treasury, it is a case between the claimant and Lesnet, and you are instructed to require the entryman to pay the receiver the proper amount of purchase money due on the final entry provided the proof is correct, and make due returns thereof to this office.

Receiver Lesnet having failed to account to the government for the purchase money in question, your office in refusing to allow final entry to be made of the land involved—though final proof already submitted should be found complete and correct—without further payment of the

purchase price of the land, based its action in the matter upon a rule alleged to have been laid down by the Department in the case of Matthiessen and Ward (6 L. D., 713) expressed in the following words:

Moneys are not payable to a receiver of public moneys until an entry has been allowed by the register and certificate given. Any moneys placed in the hands of a receiver, or sent to him, to be afterwards applied to an entry, are not moneys lawfully paid to the receiver for which the United States is responsible, but are simply individual deposits in the nature of a personal trust. Such moneys are not received officially, because not authorized to be received, etc.

The foregoing was not the ruling of this Department in the case cited, but was only a quotation from your office letter in said case. What the Department, as a matter of fact, did hold in Matthiessen and Ward, is as follows: (syllabus):

A payment accepted by the receiver in advance of the time the local office is ready to act upon an application to allow entry thereunder, is not in pursuance of any duty enjoined by law, and a failure to account for such money, in the event that the application is refused, is not a default to any obligation due the government, and the sureties of the receiver would not be liable therefor.

With regard to the material facts connected with the application of Matthiessen and Ward to purchase the decision in said case contains statement as follows:

An application to purchase under the act of June 15, 1880, (was) made by . . . Matthiessen and Ward as transferees, which was refused by the Commissioner of the General Land Office, and said decision was affirmed by the Department upon the ground, that the act of June 15, 1880, gave the right of purchase only to persons holding a conveyance from the entryman, and not to those claiming under a mere contract to convey.

Since the above named applicants were not qualified to purchase under provision of section 2 of said act of June 15, 1880, (21 Stat. 237), as their claim was based merely upon a "contract to convey," and not upon a "conveyance from the entryman," the purchase money, paid at the time application to purchase was made, was not due and payable at such time—nor could it become due and payable at any future time as appears from the facts in the case and the law applicable thereto—wherefore the receiver was not authorized to accept such money on behalf of the government, by virtue of which fact no liability could attach to the government where the receiver failed to account for money improperly paid to and accepted by him, which constitutes the payment an unlawful one.

The facts in the case of Matthiessen and Ward being entirely dissimilar to those disclosed by the record in the case at bar, the ruling in said case can have no application whatever to the case now under consideration. In the present case Mason paid the purchase money at the time he submitted his final proof on his desert land entry, and therefore at the particular time it was payable, and at which the receiver was required to accept it, under rules and instructions regulating the payment of purchase money upon lands embraced in all cash entries.

German to that particular subject will be found General Land Office circular of January 5, 1885, (3 L. D., 298) containing instructions as follows:

The purchase price of the land sought to be entered should always accompany the proof and application to purchase, and if not found therewith the papers must be promptly rejected and returned.

The circular of November 2, 1886, (5 L. D., 220)—approved by this Department—to registers and receivers at local land offices, contained additional instructions in the following words:

Proofs taken by other officers than registers and receivers must be immediately transmitted, with the money to the register and receiver . . . Proof without payment must in no case be accepted or received by registers and receivers.

In the case of *Mather v. Brown et al.* (13 L. D. 545) on review, it is held that:

The payment or tender of the purchase money is an essential part of the transaction in cash entries of the public lands.

The ruling in the above cited case is in strict accord with the foregoing regulations and instructions of the Commissioner to registers and receivers of local land offices, and also with instructions, of date November 18, 1884, (3 L. D. 188), wherein said officers were instructed that:

Proof and payment must be made at the same time. Proof presented without tender of payment must be rejected.

It would appear from the requirements of the foregoing regulations and instructions that it was equally obligatory upon receiver Lesnet to receive the purchase money in question, as it was upon Mason to pay it, at the time final proof was submitted, and before examination of said proof and in advance of any action thereon by the local office.

In analogy with the rule laid down in the case of Andrew J. Preston (14 L. D. 200) the facts as they appear of record in the case at bar—considered in connection with appellant's statement that the final proof submitted shows actual compliance with law—would seem to entitle Mason's legal representative to have the desert land claim initiated by the said Mason, deceased, passed to final entry without a second or further payment of the purchase money therefor. The said rule in Preston's case is as follows: (syllabus):

The failure of a receiver to properly account for the purchase money cannot defeat the right to a patent under the pre-emption law, where final proof is submitted in due form showing actual compliance with law, and full payment is made for the land.

In that case it is shown that final proof had been made and accepted, that the receiver had given his receipt for the purchase money, and that final certificate was issued, but it does not appear from the facts as related in the decision whether the purchase money was paid prior or subsequent to examination and acceptance of said final proof. In the absence of any evidence to the contrary, however, it will be pre-

sumed that the proceedings in all respects were regular and that all was done which was required to be done,—the payment of the purchase money as prescribed by regulations, at the time final proof was submitted and prior to the acceptance thereof.

The facts in Preston's case—in so far as they relate to the time of submitting final proof and payment of purchase money, and the neglect of the local officers to put such proof upon record, and failure of the receiver to account for the purchase money turned over to him—are similar, in such particulars, to the facts disclosed by the record in the case at bar, and the ruling in the cited case, regarding the government's liability for money paid under the circumstances stated, is based upon the rule therein quoted, as laid down by the supreme court in the case of McKnight *v.* United States (96 U. S. 186) wherein the court says:

With a few exceptions, growing out of considerations of public policy, the rules of law which apply to the government and individuals are the same. There is not one law for the former and another for the latter.

The rules of law applicable to the transactions between individuals, whereby the principal is made responsible for the acts of his agent performed in the proper transaction of the business of such principal, are too well known and settled to call for discussion here.

The facts as related in the case at bar clearly show that Receiver Lesnet accepted the purchase money in question as agent and bailee of the government at the particular time it was made payable and receivable by regulations and instructions, and that the same was accepted by him in the regular course of business, in his official capacity as such agent, while acting within the limits of his authority and recognized jurisdiction. Under such conditions I can imagine no consideration of public policy which would except the transaction between Mason and the agent of the government from the operation of the general rule of the law of agency.

In the case of *ex parte* Walter Newton (22 L. D., 322) however, where the purchase money was paid at the time final proof was submitted for the land sought to be entered, and where said official failed to account for the same, upon application by Newton for re-payment of the money, it was held (syllabus) that:

The payment to the receiver of the purchase price of a tract of land before the local office is ready to act on the application to purchase makes the receiver the agent of the applicant, who must look to such officer for the return of the purchase money, if the application is rejected.

It appears that in said case Newton did not make final proof upon his pre-emption claim until more than three years after settlement and date of presenting his declaratory statement, and about four months after a homestead entry had been made for the land involved, which said entry was not made until very nearly two years and eleven months after Newton's said settlement. A protest was filed by the homestead claimant against Newton's proof and forwarded therewith to the local office. A hearing was ordered and the result thereof was that the

local officers found against Newton upon the ground that he "failed to show compliance with the law," which judgment was affirmed by your office, and his filing duly canceled.

It was due to non-compliance with law on Newton's part, and therefore his own fault, that his application to purchase and enter the land involved was refused, and while departmental decision denying his application for repayment of purchase money paid upon the land involved at time of submitting final proof was just and proper, still the reasoning upon which that decision is based is fallacious and will not be followed.

And again, in the case of Francis J. Dysart (23 L. D., 282), it likewise appears that the purchase money was paid over to the receiver simultaneously with the submission of final desert land proof. Upon application by Dysart for repayment of the money so paid—which the receiver had failed to account for to the government or to return to Dysart—it was held (syllabus) that:

The payment of the purchase price of the land to the receiver before the acceptance of final proof is at the risk of the purchaser, and if said proof is rejected, and the receiver fails to account for the money so paid the right to repayment from the government cannot be recognized.

The decision in that case, as above indicated, is based upon the rule therein cited, as laid down by the supreme court in *Gibbons v. United States* (8 Wall., 274), wherein the court say:

No government has ever held itself liable to individuals for the misfeasance, laches, or unauthorized exercise of power by its officers and agents.

The act of the receiver in accepting the purchase money paid by Dysart, which, in accordance with regulations was due and payable at the time of such acceptance, was a lawful act performed in a proper manner, and was not, therefore, either a misfeasance or, in any sense, an unauthorized act on the part of said official in so accepting the same. It was with particular reference to the *unauthorized* acts of officers or agents of the government that the court were speaking when they gave expression to the rule above laid down, in connection with which the court, later on in the same case, say:

But it is not to be disguised that this case is an attempt under the assumption of an implied contract, to make the government responsible for the unauthorized acts of its officers, those acts being in themselves torts.

Thus it would appear that the rule laid down by the court in the case of *Gibbons v. United States*, and which is relied upon in the case of Francis J. Dysart, *supra*, is not applicable to the facts in said case as related therein, since the act of the receiver in accepting the purchase money from Dysart was not, as already shown, unauthorized, but valid and proper.

The principle upon which the government is held to be liable or responsible for public moneys received by its bonded officers or agents is that the inceptive act of such officer or agent must be authorized and lawful in all particulars. Where the inceptive act is unlawful

or unauthorized liability therefor does not attach to the government. But where such incentive act is a lawful one, and one which is duly authorized; then a subsequent unlawful and unauthorized act on the part of an officer or agent, such as misappropriating or embezzling public moneys received in the due course of business, can not invalidate the prior legal act of accepting such moneys so as to relieve the government of all responsibility therefor.

Dysart's final proof was rejected for the reason that it failed to show entire reclamation of the tract covered by his desert land entry, and he filed his voluntary relinquishment, and his entry was thereupon canceled. His application for repayment of the purchase money paid by him and which was unaccounted for by the government's agent could have been considered and disposed of under section 2 of the act of June 16, 1880 (21 Stat. 287), relating to repayments, and should have been disposed of under the provisions of said statute, instead of upon the grounds stated in the decision in said case.

Payment of purchase money having been made at time final proof was submitted in Dysart's case, it was error to hold that such payment to the receiver before the acceptance or approval of such final proof was at the risk of the purchaser in case such proof was rejected, since payment is required to be made, as hereinbefore shown, prior to the acceptance of proof.

While the judgment in said case was undoubtedly correct, since Dysart by and through his own fault alone failed to make final desert land entry of the land involved, yet the reason given for rejecting his applications for repayment—when it appears that the purchase money was paid strictly in accordance with departmental ruling and existing regulations—upon the ground that such payment was not lawful and proper, is not now approved and will not be followed.

Since Russell, as administrator, in the case at bar, applies for allowance of final entry of the land in question upon the grounds hereinbefore stated, and not for repayment of the purchase price thereof, the government is not without the authority of law to discharge its obligation for the money received and embezzled by Receiver Lesnet, its authorized agent. Such liability can be discharged by acceptance or allowance of applicant's application.

You will, therefore, cause the final proof submitted, as alleged, in this case to be examined, and if upon examination the same is found correct and sufficient in all particulars by your office, it shall be approved, and Mason's legal representative will be allowed to make final entry of so much of the land claimed as has been reclaimed and paid for to which the estate of the said Mason, deceased, would be entitled under law, without further payment of the purchase price of the land involved.

The decision appealed from, modified as above indicated, is hereby affirmed.

ALLEN L. BURGESS.

Motion for review of departmental decision of January 8, 1897, 24 L. D., 11, denied by Secretary Bliss, September 2, 1897.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

GRANDIN ET AL. v. LA BAR.

In holding that the right of purchase from the government under section 5, act of March 3, 1887, is not restricted to cases in which the purchase from the company was made prior to the passage of said act, but that the protection extended to settlers in the second proviso to said section is limited to settlement made before the passage of said act, the Department recognizes the remedial purpose of said section, and the rule of construction that the proviso, being a limitation of the remedy, must necessarily receive a strict construction.

A settler who is claiming the benefit of the second proviso to said section is not entitled to plead want of notice as to adverse claims through the company, where at the time of his settlement he was apprised of the company's selection, and the record at such time disclosed a conveyance of the land by the company.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897. (W. V. D.) (F. W. C.)

Edward G. La Bar has petitioned for the exercise of the supervisory power of the Secretary of the Interior, in the matter of the case of Grandin *et al.* v. La Bar involving the SW. $\frac{1}{4}$, Sec. 7, T. 146 N., R. 50 W., Fargo land district, North Dakota, and that further hearing be afforded him to the end that he may be sustained in his claimed superior right to said tract.

La Bar's claim to this tract is based upon a settlement made October 1, 1857. The land is within the indemnity limits of the grant for the Northern Pacific Railroad company, and was included in its list of selections filed March 19, 1883.

In the contest that arose between La Bar and the company upon his (La Bar's) application to enter the land, the company's selection was ordered canceled and La Bar was permitted to complete entry as applied for. See departmental decision of October 14, 1893 (17 L. D., 406). La Bar thereupon gave notice of his intention to submit final proof, December 30, 1893, being named in the notice.

On December 29, 1893, John L. and William J. Grandin made formal application to purchase this land under the provisions of section 5 of the act of March 3, 1887, (24 Stat., 556), alleging that they had purchased the land from the Northern Pacific Railroad company on September 15, 1876, and on the following day (December 30, 1893), filed a protest against the acceptance of La Bar's proof.

La Bar made proof as advertised, which was duly accepted by the local officers, the protest by the Grandins being overruled, and final certificate issued to La Bar.

In accordance with your office letter of May 4, 1894, the Grandins were permitted to offer proof in support of their application to purchase and La Bar was specially cited to appear.

At the appointed time both parties appeared and hearing was duly held.

Upon the record made, the local officers recommended that La Bar's entry be canceled. Said recommendation was sustained and La Bar's entry held for cancellation by your office decision upon said record, and, upon appeal, your office decision was affirmed (23 L. D., 301).

In his petition La Bar states that—

I did, on the 1st day of October, 1887, make a pre-emption settlement on said tract. I immediately commenced improvements on the land, built a house thereon into which I moved my family, and I have continued to reside on that land with my family to the present day. It is my only home, and I have on said tract over \$3000 worth of improvements, including a house which cost \$900, a barn which cost \$500, a granary which cost \$500, a well which cost \$300, and other improvements.

It is not only my home, but all I have, the saving of years of toil and labor, is invested in that land.

When I settled October 1st, 1887, it was wild prairie, not a sod had been turned, nor any improvements whatever made thereon. There were no signs or evidence of ownership or possession on the land.

I supposed and believed that there was no claim to it by any person or persons except the government and the railroad company, and my settlement and improvements were made in perfect good faith, and were based upon the public orders of the Land Department, stating that these lands were subject to entry.

I earnestly ask your special attention to these facts in relation to my settlement.

The railroad company asserted a claim to the tract adverse to mine, and after much litigation the case was finally decided by the Secretary of the Interior on October 14, 1893, in my favor, and he held that I had a right to make final entry and payment for the land (17 L. D., 406).

In compliance with this decision I did on December 30, 1893, make final entry and payment for the tract, and it was at this time that J. L. & W. J. Grandin made application to purchase the tract under the 5th section of the act of March 3, 1887, and notwithstanding the express decision which had been made in my favor by the Secretary of the Interior, awarding me the land, and the fact I had made payment for it, and the fact that I was a settler on the land under the orders of the Land Department, and had resided thereon for years, Secretary Smith did, on August 29, 1896, render a decision cancelling my entry, and awarding the land to the said Grandin (23 L. D., 301).

Now, this petition is filed to ask that you will correct the wrong and injustice inflicted upon me by this action, and to reconsider this case upon the point that was entirely ignored by Secretary Smith in his decision, and upon a point which justifies a rehearing in the case.

An examination of the decision of Secretary Smith shows that no notice was taken of, or any attention given to, the fact that I was a settler upon the land, and was protected by the express provision of law. I ask for this rehearing, not upon the ground that a man can not be a purchaser in good faith from a railroad company who makes payment for his land with the stock issued by the company, which was the only question discussed by Secretary Smith in his decision, but I ask it upon the ground that the land upon which I was a settler was not subject to purchase under the 5th section of the act of March 3rd, 1887, that it could not be thus purchased to the exclusion of my right as a settler in good faith.

The proviso to the 5th section of the act of March 3, 1887, expressly stipulates

that the provisions of said section shall not apply to land settled upon subsequent to December 1, 1882. In other words, lands thus settled upon are excepted from the operation of said section. This provision of the law is clear and explicit, and I submit that it was in accordance with the general tenor of land legislation, which has for its aim and purpose the settlement of the public lands, and the protection of bona fide settlers, who have, upon the faith given to the promises of the government by its citizens, made their homes upon the public lands as I have done.

I am aware that the Land Department has held in some cases that the proviso to the 5th section of the act of March 3, 1887, protecting settlers, does not apply to those who settle after the passage of said act.

In the argument filed in support of the petition, after referring to the rulings of this Department to the effect that a settlement under the second proviso of the 5th section of the act of March 3, 1887, (*supra*) must have been made before the passage of the act, it is stated—

The Department held (22 L. D., 238), that a party who purchased from the railroad company subsequent to the passage of the act of March 3, 1887, is protected by the st

Let us carry these two rulings to their logical conclusion and see how cruel and unjust it is to hold that a purchaser subsequent to the passage of the act is protected by its provision, but that an honest and bona fide settler is not thus protected.

In the case of *Osborn et al. v. Knight* (on review), 23 L. D., 216, the contention was made that the decision in the case of *Balch v. Andrus*, (22 L. D., 238), in effect overruled the previous holdings of this Department on the question as to the right of a settler under the second proviso to said section 5, of the act of March 3, 1887, and in the answer thereto it was stated:

Under the repeated rulings of the Department, a settlement claim initiated after the passage of the act of March 3, 1887, cannot affect the right of the purchaser from the company to make purchase from the United States under the provisions contained in the body of section five of said act (*Chicago, St. Paul, Minneapolis and Omaha Ry. Co.*, 11 L. D., 607; *Union Pacific R. R. Co. et al. v. McKinley*, 14 L. D., 237; and *Swineford et al. v. Piper*, 19 L. D., 9).

I can see no reason for changing this holding, nor does the decision of this Department in the case of *Balch v. Andrus* (*supra*) make a change necessary.

The fifth section of the act of March 3, 1887, was remedial in its nature, and should be liberally construed to embrace the remedy, viz: the protection of those who had in good faith brought (bought) lands supposed to have passed under a railroad land grant which had, for any reason, been excepted therefrom.

In the case of *Balch v. Andrus* (*supra*) it was held:

‘That it can make no difference whether the purchase from the company was made before or after the passage of the act of March 3, 1887, if made in good faith, believing the title to be good and before the land purchased was held to be excepted from the grant.’

The second proviso to said section in favor of settlers was a limitation upon the right of purchase and should be strictly construed. To hold that it embraced settlements made after the passage of the act of March 3, 1887, would be to offer an inducement to ‘jumpers’ to settle upon lands held under a title believed to be good, a purpose it cannot be believed was intended by the legislators.

La Bar claims to have had no notice of any claim through the railroad company at the time he made his settlement, but the proof made by the Grandins shows that their deed from the company was recorded as early as March 10, 1877, more than ten years prior to his settlement.

This was constructive notice to La Bar, and as he was apprised of the selection by the company he was put upon inquiry as to whether the land had been sold by it.

While it is unfortunate that he had expended large sums in the improvement of this tract, yet this Department is powerless to afford him protection in the same by patenting to him the land under his entry.

The petition is accordingly denied and herewith returned for the files of your office.

PENNINGTON *v.* NEW ORLEANS PACIFIC RY. CO.

Motion for review of departmental decision of July 27, 1897, 25 L. D., 61, denied by Secretary Bliss, September 2, 1897.

RELINQUISHMENT—VOLUNTARY ACT—AGENT.

KERR *v.* KELLY.

A relinquishment will not be recognized if it does not appear to have been the voluntary act of the entryman.

Under a relinquishment executed without consideration, and for the benefit of one holding a fiduciary relation to the entryman, it is incumbent upon the party presenting the same to show that no advantage was taken of the entryman, if the good faith of the transaction is called in question by him.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897. (W. V. D.) (C. W. P.)

On February 23, 1886, Thomas Kerr made timber culture entry, No. 1163, of the SW. $\frac{1}{4}$ of Sec. 34, T. 23 S., R. 28, Visalia land district, California. On June 28, 1892, Edward J. Kelly filed an affidavit of contest against said entry, which was received by the local officers, subject to a prior contest then pending against said entry.

On August 30, 1893, Kelly withdrew his contest and filed a relinquishment of said timber culture entry, purporting to be executed by said Kerr on November 29, 1890: whereupon said timber culture entry was canceled on the records of the local office. On the same day Kelly presented homestead application for said land, which the local officers received and held suspended until the final disposition of the pending prior contest.

On September 4, 1893, Kerr filed an application, whereby he asked that his timber culture entry be reinstated on the ground that he never knowingly executed said relinquishment, and if he did execute the same that he was then confined in the hospital of the city and county of San Francisco, California, and was in feeble health, and it was procured by his being deceived as to its nature, and that the same is fraudulent and is not an abandonment duly acknowledged by him.

A hearing was thereupon had before the local officers on September 24, 1895. Upon the testimony submitted the local officers, on October

17, 1895, found that Kerr executed said relinquishment when he was in a very feeble condition; that he did not intentionally execute and deliver it to Kelly, or any one else, to file, and that there is no evidence of its delivery; and they recommend that the relinquishment be set aside and Kelly's timber culture entry reinstated.

On appeal, your office, by decision of April 22, 1896, held that it is plain that this relinquishment had no legal effect; that a relinquishment to be effective must be the voluntary act of the entryman; and that Edward Kelly, the father of Edward J. Kelly, received the relinquishment, while he was Kerr's agent, when he received other papers from Kerr for safe keeping; and that it was not in legal contemplation such an instrument, while it was in his custody, and that no authority is shown, or claimed, authorizing Edward Kelly to deliver the relinquishment to his son, Edward J. Kelly, or to file it himself in the land office, and affirmed the judgment of the local officers.

Kelly appealed to the Department.

The material facts are sufficiently stated in the decision appealed from, and I concur in your office decision that the relinquishment should be set aside and Kerr's timber culture entry reinstated.

In the case of *Deming v. Cuthbert et al.*, 5 L. D., 365, it is held that it is competent for the Department to investigate and determine whether a relinquishment was executed in good faith, or whether the Department has been imposed upon by fraud. And in the case of *O'Brien v. Richtarik*, 8 L. D., 192, it is said that it is well settled that a relinquishment, to be effective, must be the *voluntary act* of the entryman.

Kerr swears that the relinquishment was not his voluntary act, and that it was not filed in the local office with his knowledge or consent. And it is not pretended that it was executed by Kerr for a valuable consideration. If it is claimed that it was executed for the benefit of Edward Kelly, without consideration, the testimony shows that at the time Kerr executed the relinquishment, Edward Kelly occupied a confidential relation to Kerr—that he had been authorized by power of attorney to represent Kerr in the contest then pending against his entry, and it is an established principle of equity jurisprudence, that a party seeking to set aside a gift, or other disposition of property in favor of one who stands in a fiduciary relation to him, is not called upon to show direct fraud, or advantage taken of the confidential relation between them; but that such party ought himself to show that no such advantage was taken; that all was fair; that he received the gift freely and knowingly on the giver's part, and as a stranger might. (*Story's Equity Jurisprudence*, Secs. 307-308-311-315.)

Edward J. Kelly has not thought proper to call his father, Edward Kelly, as a witness, and it is not shown that no advantage was taken of Kerr, that all was fair. And the defendant Edward J. Kelly does not pretend that he paid anything for the relinquishment. The Department will not sanction such a transaction. Your office decision is affirmed accordingly.

BEHAR *v.* SWEET.

Petition for reconsideration of departmental action herein, see 24 L. D., 158, denied by Secretary Bliss, September 2, 1897.

SEGREGATION SURVEY—MEANDER LINE—RIPARIAN RIGHTS.

STATE OF CALIFORNIA *ET AL.* *v.* UNITED STATES *ET AL.* (ON REVIEW.)

In the case of a survey that is closed upon a meander line run for the purpose of separating arable lands from alleged swamp and overflowed lands, lying upon the borders of a lake, thus leaving a tract unsurveyed between the shore of said lake and said meander line, parties taking title to the lands so surveyed acquire no riparian rights to the unsurveyed lands lying beyond said meander line.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897. (W. V. D.) (C. J. G.)

A motion has been filed in this Department for review of its decision of January 30, 1897, in the case of State of California *et al. v.* The United States *et al.* (24 L. D., 68), involving certain unsurveyed lands, bordering on Little Klamath Lake, in T. 47 N., R. 2 E. and T. 48 N., R. 1 E., M. D. M., San Francisco land district, California.

The main point upon which said departmental decision was predicated is that the lands in controversy have never been officially surveyed. The Department therefore directed a survey of the unsurveyed lands in T. 47 N., R. 2 E., in order to quiet certain titles thereto, but refused to direct a survey of the lands in T. 48 N., R. 1 E., because it does not appear that title to any of said lands has passed from the government.

The grounds for the motion for review are stated in the following specifications of error:

1. In finding that the land at the date of the survey was neither swamp land nor part of the lake-bed.
2. In holding that the land at the date of the survey should have been surveyed as agricultural public land.
3. In holding that the plat is erroneous in representing the land as part of the lake-bed.
4. In assuming power to correct supposed errors in a previous final judgment of the Department.
5. In holding that the facts of the present case required or justified the exercise of said supposed corrective power.

For the purposes of the present decision it will only be necessary to invite attention to some of the salient facts upon which the former departmental decision was based.

The original proceedings in this case were instituted by John A. Fairchild *et al.*, who, styling themselves as "applicants for the government title to the swamp and overflowed lands hereinafter described,"

petitioned the governor of California for an immediate survey of said lands.

Subsequently W. B. McGill *et al.*, representing themselves as homestead settlers upon the lands in question, intervened by filing a petition in which they denied the claim of the State of California and the swamp land claimants, that said lands are or were swamp and overflowed. They therefore

prayed that the lands be officially surveyed, with a view to determining the respective rights of the State of California and the swamp land claimants on the one hand, and of the United States and the homestead settlers on the other; in order that they may be able to make their entries according to law.

A hearing was accordingly had, and in due time all the papers in the case were transmitted to your office. The principal question at said hearing was as to the character of these lands at the date of the swamp-land grant, namely, September 28, 1850.

It appears that the survey upon which the first plat of T. 47 N., R. 2 E., was based, was made in the year 1874. At that time United States Deputy Surveyor McKay ran and established a meander line to mark the boundary between the "plateau" of arable public land and the lands which he considered swampy and unfit for cultivation. This left unsurveyed a tract, containing by estimation 7,080.69 acres, between the arable land aforesaid and the boundary of Little Klamath Lake. This is the tract in controversy and was designated by the deputy surveyor on his plat and field notes as "swamp and overflowed land." It lay between the "inner meander line," so called by the surveyor, separating the arable from the alleged swamp and overflowed land, and the "outer meander line" (imaginary) separating the swamp and overflowed land from the waters of the lake proper. The subdivisional lines were closed at the "inner meander line," thus leaving, as heretofore stated, the land in question unsurveyed.

Your office, in a letter addressed to the surveyor-general, found the returns of survey defective and irregular . . . in that neither the exterior meanders nor subdivisional lines were actually established in the field; . . . but the line called the outer line of tule, etc., or segregation of the impassable swamp from the open lake, although run and measured on the ice, was not marked in any manner, neither was there any subdivisional corner set or driven in any part of the "impassable swamp."

Your office thereupon took the following action:

Under these circumstances the survey as a whole, cannot be approved by this office, and is therefore rejected in so far as relates to the running of said "outer meander line" and the consequent platting of swamp lands.

I have to direct that upon receipt hereof, you will make annotation upon the plat and field notes of this survey, of my decision, and prepare a new plat showing the survey of the township only to the "inner meander line," so called by the surveyor..

The surveyor general went in person upon these lands and "carefully retraced the line of segregation of the swamp and overflowed land from the dry land." In his report to your office he says:

I found that said line was properly established; and that the meander line of Mr.

McKay's survey had been properly run upon the shores of the lake, and might have been established at any time by submitting to a little inconvenience and wading through the mud—the waiting for the formation of the ice being wholly unnecessary.

On March 20, 1894, your office rendered a decision in this case, finding that for many years (prior to 1874, and doubtless in 1850) the waters of Little Klamath Lake covered all the lands which were subsequently found to be situate outside of the meander line established by McKay in his survey of 1874 and 1879.

After thus finding that these lands did not pass to the State of California under the swamp land grant of September 28, 1850, your office decided as follows:

It therefore seems clear that the requisite exterior, meander and subdivisional lines in T. 47 N., R. 2 E., M.D.M., should be extended, where the title to the lands up to the shore line remains in the government, and you are accordingly hereby authorized to award a contract to a competent and reliable deputy surveyor for the extension of said lines. This authorization, however, must not be applied to any portion of the uncovered or recession lands in said township when the titles to the lots adjoining the original meander lines of Little Klamath lake in sections 17, 18, 19, 20, 30, 34 and 35, as hereinbefore detailed, have been disposed of; it being held in those cases that the riparian rights of said adjoining proprietors must be recognized.

No appeal was taken from your said office decision either by the State of California or the swamp land claimants; consequently the question as to the character of these lands is eliminated from the case, leaving it to stand upon the petition of the homestead settlers for an official survey, "in order that they may be able to make their entries according to law." The only question to be decided, then, was whether the land upon which these people have their homes was or was not public land which had not been officially surveyed.

The swamp land claimants have appeared in opposition to the homestead settlers, now "claiming as riparian purchasers of the lands involved," and file a motion for review of departmental decision of January 30, 1897, as heretofore stated; thus expecting, as was stated in said decision, to accomplish the same practical results that they had hoped to attain by their petition as swamp land claimants.

The Department approved the finding of your office that on September 28, 1850, these lands were not swamp and overflowed, and affirmed your office decision disallowing the claim of the State of California to said lands under the swamp land act.

The Department did not concur, however, in the finding of your office that the lands in question were once part of the bed of Little Klamath lake, or that the fractional lots shown upon the maps of the township abutted upon or were adjoining to the shore of said lake, or that the owners of said lots had riparian rights which must be recognized. It was held that

the topography of the neighboring country as shown in evidence, proves conclusively, that it is physically impossible, that the lands referred to, could have been

covered in 1850, or in 1874, or in 1880, or at any other time, since 1850, by the waters of Little Klamath lake.

As to the character of said land the Department held as follows:

Moreover, if it were true that in the year 1850, said 7,080.69 acres constituted part of the bed of Little Klamath lake and were entirely covered by its waters, that fact (if shown) would be immaterial and irrelevant in this case. If in the interval between 1850 and 1874, said 7,080.69 acres had been brought to the light, by accretion or by reliction—by the gradual accumulation of earthy matter or by the recession of the waters of the lake—such increment of land would have been in 1874 the property of the United States as the sole owner during that period of time. . . .

The witnesses all agreed that in 1874, there was no lake upon the land in controversy; and that the estimated tract of 7,080.69 acres, designated on the first map as "swamp and overflowed land," was land in full view. They differed as to the character of the land, whether it was in whole or in part, wet or dry—arable or unfit for cultivation. It is not necessary for the disposition of this case to decide between them. It is enough to find, as the Department does, that there is a large body of public lands belonging to the United States which has never been surveyed now occupied by homestead settlers.

Thus, contrary to the allegation in the first specification of error, the Department refrained from finding what was the character of these lands at the time of the 1874 survey.

What is known as the official map of February 3, 1880, was constructed from the field notes of the surveys on file in the surveyor general's office, in accordance with the instructions contained in your office letter rejecting in part the survey of 1874. This Department, in construing said instructions, employed the following language:

Your office distinctly recognized "the inner meander line so called by the surveyor,"—not as a meander of Little Klamath Lake—but as the line of demarkation between the lands high and arable, and the lands alleged to be swamp and overflowed; and plainly directed the surveyor general to "prepare a new plat showing the survey of the township only to that line," which was in fact the extent of McKay's actual survey. Your office thus approved the plat and survey and field notes first returned, so far as the courses had been run, lines meandered, and corners established, actually, in the field; and rejected them only as to the residue of the township. The new plat was intended to show that the township was only partially surveyed; and that all the lands north and east and northeast of the arable land aforesaid were unsurveyed.

From this it may be seen that the Department did not find that the land at date of survey should have been surveyed as agricultural land, as set out in specification of error number two; only that the lands outside the "inner meander line" were unsurveyed. Neither did the Department hold that the plat of survey was erroneous in representing the land as part of the lake bed, as claimed in specification number three; only that the plat represented no survey north and east and northeast of this meander line. The Department held that the new plat and the first plat, which were bound together,

show conclusively that none of the lots surveyed and numbered therein abut upon or adjoin Little Klamath lake;—except lots 4, 5 and 6 in section 25, which have not been disposed of by the United States.

It was therefore held that none of the owners of these lots have any riparian rights whatever; "that the lands granted by their patents were limited by the straight subdivisional and meander lines which defined the lots on the face of the map." As previously set out herein, the deputy surveyor did not make an actual survey north of his meander line which separated the arable from the alleged swamp and overflowed lands. Your office directed that a new map be constructed from the field notes of the actual surveys, "showing the survey of the township only to the 'inner meander line'." This new map was recorded as the official map, and all filings, entries and patents were made and issued with reference to said map. The lines of survey were closed upon this inner meander line, which separated the arable lands according to the survey from lands that have never been surveyed. Hence, the patentees could have no riparian rights, as they were limited by said line, the unsurveyed lands outside thereof belonging to the United States.

The Department deems it unnecessary to consider specifications of error numbers four and five. From what has been set forth herein it may be seen that the motion for review presents no essential matters of law or fact not heretofore carefully considered and adjudicated. The said motion is accordingly denied.

DOYLE *v.* BENDER.

Motion for review of departmental decision of June 17, 1897, 24 L. D., 535, denied by Secretary Bliss, September 2, 1897.

RAILROAD GRANT—SWAMP GRANT—ADJUSTMENT.

DORN *v.* ELLINGSON. (ON REVIEW.)

A notation appearing of record, at the date of a railroad grant, that a tract has been selected as swamp land is ineffective as against the operation of the grant, if, at such time, said notation appeared of record without authority of law.

Secretary Bliss to the Commissioner of the General Land Office, September 2, 1897. (W. V. D.) (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 13, T. 98 N., R. 10 W., Des Moines land district, Iowa, and is before the Department upon motion for review of departmental decision of February 18, 1897 (24 L. D., 163).

It appears from the record in this case that this land is within the primary limits of the grant to aid in the construction of the McGregor and Missouri River Railroad under the act of May 12, 1864 (13 Stat., 72).

This land was contained in a list that was filed in your office March 17, 1852, by George B. Sargent, surveyor-general, and therein described as swamp land.

On March 24, 1895, Elling H. Ellingson, the defendant, made homestead application, which was allowed by the local officers on account of waiver by the Secretary of the State of Iowa, showing that the selection above referred to did not appear among the swamp selections of the county wherein this land was situated.

On July 5, 1895, the local officers transmitted the record in the application of David Dorn to make final proof of his right to purchase under the fifth section of the act of March 3, 1887 (24 Stat., 556).

In the decision under review it was held that the tracts in controversy did not pass to the State of Iowa under the swamp land act, but did pass to the McGregor and Missouri River Railroad under the act *supra*, and therefore to its successor the Chicago, Milwaukee and St. Paul Railroad Company, and in consequence thereof no right of purchase existed on the part of David Dorn, the land not having been excepted from the grant to the railroad company. In said decision reference was made to your office letter "K" of October 30, 1891.

In the motion for review it is said

It is admitted by this petitioner that said letter contains a correct statement of the facts relating to the filing of the "Sargent" list, the approval and subsequent revocation of approval by the Department of part of the selection embraced in said list, and the re-selection under the State law of 1853 of some of the tracts reported by Surveyor-General Sargent, and the omission to select other tracts—those in controversy here among the latter so reported.

In the decision of February 13, 1897, in referring to the filing of the list by George B. Sargent, it is said (24 L. D., 163):

In filing said list the surveyor-general did not state that the State of Iowa had determined through its proper agents to accept its field notes as a basis of adjustment, but subsequently, on March 21, 1852, he so stated, but forwarded no agreement to this effect. And thereafter, by act of the State legislature, January 13, 1853, the swamp lands were granted to the various counties and provision was made for survey and selection by county surveyors. So it appears that if the agreement was entered into as reported by letter from Mr. Sargent, this action upon the part of the legislature was a repudiation of it.

Upon representation made to your office, on February 19, 1855, a communication was by your office addressed to the Department, asking that the former approval of the "Sargent list" made by the Department upon the recommendation of the Commissioner of the General Land Office, be revoked, and thereafter, to wit, on March 1, 1855, said approval was revoked. Prior to this time other lists had been filed showing the swamp lands claimed by the State under the swamp act.

Counsel in his argument to sustain the motion calls attention to various inaccuracies alleged to be contained in letter "K" of October 30, 1891, of your office. I do not deem that these inaccuracies go to the question at issue. The Sargent list was one made by the surveyor-general of the State of Iowa in which certain land was returned as swamp land. There were two ways in which the State of Iowa might assert claim under the swamp land act: One was by the adoption of the field notes of the surveyor-general—in other words, by adopting

the Sargent list as a basis of settlement—and the other, by selections made in the field by its own agent.

Whilst it appears that the surveyor-general reported that the State agreed to accept his field notes as a basis of settlement, it is apparent from the record that such was not done, but that the State, by agents in the field, undertook to determine what tracts of land inured to it under the swamp act.

In this connection your said office letter "K" states that Mr. Sargent said—

That the State, after long delay, had concluded to adopt the field notes as the basis of the list, but he did not forward any agreement such as the other States entered into when the field notes were made the basis of adjustment.

Here was a return made by the surveyor-general, unaccompanied by any written evidence of acceptance upon the part of the State, followed shortly thereafter by the State putting its agent in the field for the purpose of selection, and ignoring and failing to set up claim to this land under the Sargent list, so far as this record discloses.

Prior to the confirmatory act of March 3, 1857, (11 Stat., 251) the approval theretofore made by the Department of the Sargent list was revoked, to wit: on March 1, 1855; and while it is true that at the date of the grant to the railroad company there appeared upon your tract books, in reference to the land in controversy, the notation "selected as swamp March 17, 1852," such statement remaining on the record was without authority of law, the approval of the Department having been revoked and no subsequent claim having been asserted to this land by the State under selection of its agents in the field.

No good reason appearing for disturbing the former decision, it is adhered to, and the motion for review is denied.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION.

LORENZO D. CHANDLER.

The right of an alleged assignee of a soldier's additional homestead right to a certification of said right cannot be recognized where the Department, without notice of said assignment, has allowed the soldier to make an additional entry in person.

Secretary Bliss to the Commissioner of the General Land Office, September 3, 1897. (C. J. W.)

Your office letter "C" of February 11, 1897, reports a request made by the attorney of M. J. Wine to have his application for re-certification of soldier's additional right, in the name of Lorenzo D. Chandler, excepted from the ruling of the Department in the case of Elijah C. Putman (23 L. D. 152), and you ask for instructions in reference thereto.

It seems that Lorenzo D. Chandler, April 13, 1866, made homestead

entry No. 3329, Springfield, Missouri, series—final certificate No. 1274, issued June 17, 1873—eighty acres, which was duly patented.

On May 10, 1875, soldier's additional homestead entry No. 671, final certificate No. 204, was made at Susanville, California, under the provisions of section 2306 of the Revised Statutes, for eighty acres—the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 3, T. 27 N., R. 7 E.—by Lorenzo D. Chandler, which passed to patent, but this patent and entry were canceled May 10, 1882, by decree of court, on the ground that the entry was fraudulently obtained. (See 13 C. L. O., 167).

On June 6, 1882, Heylmun and Kane, acting for M. J. Wine, filed an application for the issuance of a certificate of additional right in *Chandler's name*. No assignment, no notice of assignment, and no power of attorney accompanied this application.

November 2, 1885, D. K. Sickels filed an application for issuance of similar certificate in Chandler's name, together with a power of attorney, executed by Chandler, October 27, 1885, authorizing Sickels to prosecute Chandler's claim for additional homestead. April 2, 1886, Sickels and Hickox asked that Chandler be allowed to make an additional entry in person, under the provisions of departmental circular of February 13, 1883. May 19, 1886, it was held by your office that Chandler could exercise his right to make additional entry in person. On July 19, 1886, Heylmun, surviving partner of Heylmun and Kane, appealed from that decision but the appeal was subsequently dismissed by the Department (7 L. D., 356). In the decision it was said:

Pending this appeal, it appears from the records of your office, Chandler went to the local office at Lamar, Colorado, and there on September 7, 1887, made his additional entry in person.

This action on his part makes it unnecessary to consider further his application for certificate.

As the certificate would be only the evidence of his right to make entry, it is plain that its issuance now would not serve him, as he has already exercised the right. No judgment on the question of his right to certification, therefore, will be rendered.

Appellant Heylmun complains of the substitution by Chandler of other attorneys, without notice to him. This however is a matter between client and attorney, and raises questions which it is not deemed appropriate for the Department to consider, the fact being that applicant, having exercised his right, has removed the basis of his claim for certification.

That case was closed October 29, 1888, and no further steps were taken until December 10, 1895, when the matter was called up by the letter of Mr. Hazelton, attorney for Wine, who, it is alleged, is a bona fide purchaser of Chandler's right, by assignment. July 21, 1896, Mr. Hazelton, as such attorney, filed two powers of attorney executed by Chandler to Wine, dated respectively May 29, 1882, and June 6, 1887. These powers of attorney authorize Wine to locate lands under Chandler's additional right and to sell such land, and are coupled with an interest in Wine which is declared to be irrevocable.

While the right to an additional entry has in fact been exercised by Chandler, no certificate of the right was ever issued, and, as held in

the case of Elijah Putman, no such certification was necessary. The entry of eighty acres by Chandler at Lamar, Colorado, which passed to patent February 2, 1889, exhausted his right to an additional entry.

The fact of assignment and the powers of attorney on which Wine relies were not made known to your office until after the additional right had been so exercised by the soldier. Under the ruling in the Walker case (25 L. D., 119) Wine is not entitled to the certification asked, for the reason that his claim under the assignment was not made or asserted until after Chandler had in person exhausted the right to an additional entry. If Chandler had been allowed to make the additional entry after the assertion of Wine's claim under the assignment a controversy might arise whether another entry could now be made by Wine under the assignment, or whether he would have his remedy only against Chandler or the land so additionally entered by Chandler, or whether he would be without remedy; but no such question is presented in this case, and no decision thereof is now necessary; neither was it intended to determine that question in the Walker case, *supra*.

There is nothing in the record to authorize this case to be excepted from the ruling in the case of Elijah C. Putman, and the request is denied.

SOLDIERS' HOMESTEAD—MINOR—COMPLIANCE WITH LAW.

LABATHE v. ROBORDS.

The validity of a soldier's homestead entry, regularly made on behalf of a minor by his curator, is not affected by the unauthorized agreement of said curator to convey the title, when acquired, to another person.

The cultivation and improvement of the land covered by such entry procured by the curator, in such a case, may be deemed a sufficient compliance with the law as construed by the circular regulations then in force.

Secretary Bliss to the Commissioner of the General Land Office, September 3, 1897. (W. V. D.) (E. B., Jr.)

On November 22, 1894, Charles Love, minor orphan child of William Love, by E. M. Robords, curator, made homestead entry No. 17,151, under section 2307 of the Revised Statutes, for lots 1, 2 and 3, of section 6, T. 44 N., R. 15 W., St. Cloud, Minnesota, land district. On March 23, 1896, Seymour Labathe initiated a contest against said entry, charging, in substance, that the same was unlawful and fraudulent in that it was made by said Robords in collusion with one Lyman M. Linnell in pursuance of a corrupt agreement between them to secure title to the land above described by means of the homestead right of the said Charles Love, for their own sole gain and advantage, in fraud both of the right of said Charles Love and against the United States; and that there had never been any settlement or improvement on the land nor any

cultivation thereof by said Robords or said Charles Love, nor by any one in the interest of the latter.

A hearing was duly had October 1, 1896, and from the testimony adduced thereat the local office, on November 13, following, found in favor of contestant, and recommended the cancellation of the entry. On appeal by Robords, your office, on January 23, 1897, affirming the decision of the local office, decided that Robords made the entry fraudulently; that he had no authority, as curator of Charles Love, to make the entry, and was not acting in the interest of said Love, but sought to acquire title to the land for his own use and benefit; and therefore held the entry for cancellation. Robords' appeal, in which he assigns error upon each ground of the decision of your office, brings the case here.

It appears that Charles Love, in whose behalf this entry was made, was born August 28, 1875; that he was the son of William Love, who served as a private soldier in the war of the rebellion in Company "B", 39th Regiment of Iowa Infantry, from August 11, 1862, to June 5, 1865; that the father, William Love, died about September 10, 1876, leaving a widow, the mother of Charles Love; that the widow remarried in 1877, and died in June, 1894; that on July 28, 1894, said E. M. Robords was appointed curator of the estate of said Charles Love, a minor and person of weak mind, and residing in Greene county, Missouri, by the probate court of said county; and that at the date of said entry said Charles Love was the only minor child of said William Love, and when this contest was initiated was an inmate of the poor house in said county and had been there for some time previous.

It further appears that prior to the date of said entry said Robords entered into an oral agreement with said Linnell to the effect that the latter was to cultivate and improve the land above described in behalf of said minor, and that after title to the same had been perfected under said entry, Robords was to sell the same to Linnell for five dollars per acre; and that within six months from the date of said entry Linnell, pursuant to his agreement with Robords, had a house built on the land and three quarters of an acre of the land prepared for cultivation and part of it planted in garden vegetables.

This entry appears to have been regularly made in behalf of said minor. It was not necessary, as seems to be contended in behalf of the contestant, that before making the same, Robords, as curator, should have secured an order from the probate court as authority therefor. It was part of his duty as curator, without such order, to assert the minor's homestead right and duly prosecute the same to entry and patent for the sole benefit of the soldier's orphan child. The agreement with Linnell to sell him the land, was in violation of the homestead law, and fraudulent on the part of Robords; but with that the minor had nothing to do. He was not in any sense a party to it. He knew nothing of it; and even if such an agreement had been otherwise lawful, it could have no validity without the previous order or subse-

quent approval of the probate court. It had neither. It was the wholly unauthorized personal act of Robords, and without legal effect upon the homestead right of his ward. As an attempt at fraud, or act of bad faith, it can in no way be imputed to the minor.

Neither the guardian nor his ward, the child of a soldier, is required to reside upon a homestead made under section 2307 of the Revised Statutes (*Lamb v. Ullery*, 10 L. D., 528; and see also case of *Ella I. Dickey*, 22 L. D., 351).

In discussing the meaning of the word "settlement," as used in said section 2307, the Department said, in the *Dickey* case:

In the section under consideration it seems to have been the intention of Congress to require of the widow or guardian some personal connection with the land, though the requirement of residence was avoided.

To this conclusion, then, we come, that the widow of a deceased soldier or sailor, who makes homestead entry under the provisions of section 2307 of the Revised Statutes, must identify herself with the tract claimed by some personal act thereon indicative of her claim, but need not reside on the land.

But it was not shown in that case that the claimant had identified herself with the land by any personal act thereon, and, quoting from general circular instructions of 1884, 1889, and 1892, it was further said:

"If the land is cultivated in good faith the law will be regarded as substantially complied with." This is the information that the Department has given to the public through the medium of its general circulars, and with the law as thus construed Mrs. *Dickey* has strictly complied.

A departmental construction of a statute, until revoked or overruled, has all the force and effect of law, and acts performed thereunder are entitled to protection. *Mary R. Leonard*, 9 L. D., 189.

The general circular issued October 30, 1895 (page 24), the latest issued, contains the same language last above quoted. In the case at bar it is not shown whether said Robords, as curator, ever identified himself with the land by any personal act thereon. Labathe's contest affidavit alleges that Robords made no settlement, but Labathe did not prove that this allegation is true. Robords procured the cultivation of the land and the placing of improvements thereon as above indicated, and these, under the circumstances, and following the rule cited and approved in the *Dickey* case, will be deemed a sufficient compliance with law in the case of this needy and weak-minded soldier's orphan, whose rights are entitled to the utmost consideration and protection the government is able to afford them, whether it be against the neglect or the rapacity of his guardian.

The decision of your office is reversed. The contest is dismissed, and the entry will remain intact. It is suggested that you send, by registered mail, a copy of this decision to the said probate court.

REPAYMENT—ERRONEOUS CANCELLATION.

FALK STEINHARDT.

If an entry on the proofs presented is properly allowed, and on subsequent investigation is canceled, the fact that such cancellation is erroneous, under a changed construction of the law, will not justify repayment.

Secretary Bliss to the Commissioner of the General Land Office, September 3, 1897. (C. J. G.)

On August 25, 1883, Falk Steinhardt made timber land entry for the SE. $\frac{1}{4}$ of Sec. 20, T. 6 N., R. 3 W., Oregon City land district, Oregon.

The said entry was allowed on the sworn statement of the entryman "that said land is unfit for cultivation, and valuable chiefly for its timber."

On September 11, 1886, after a hearing had upon the report of a special agent, your office held said entry for cancellation on the ground "that the land is not such as is subject to entry under the act of June 3, 1878." No appeal was taken from your said office decision and the entry was finally canceled.

Subsequently Steinhardt made application for repayment of the purchase money, to wit, the sum of \$400.00, paid by him on his said entry.

On January 20, 1887, your office denied said application on the ground that the entry was canceled as being fraudulent.

Steinhardt appealed, and this Department, on July 7, 1888 (7 L. D., 10), affirmed the decision of your office, holding as follows (syllabus):

Repayment will not be allowed when a timber land entry is canceled because the land is not subject thereto, and it appears that the preliminary affidavit was made without examination of the land or knowledge of its condition.

On May 15, 1896, the local office transmitted a second application of Steinhardt for repayment of the purchase money, which your office, on May 25, 1896, declined to approve on the ground that Steinhardt's first application had been denied by your office, and upon appeal the said denial had been affirmed by this Department.

Steinhardt has again appealed to this Department. His second application for repayment, as set forth in the brief accompanying the said appeal, is based upon the decision of the supreme court in the case of *United States v. Budd* (144 U. S., 154), and the decision of this Department in the case of *E. C. Masten* (22 L. D., 337).

The act of June 16, 1880 (21 Stat., 287), which authorizes repayment to be made in certain specified cases, is as follows:

In all cases where homestead or timber-culture or desert-land entries or other entries have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid, etc.

It is very apparent that the entry in question was not "canceled for conflict." By reference to the case of Christopher W. McKelvey (24 L. D., 536), and the cases cited therein, it will be observed that it has been and is the opinion of the Department that the words "erroneously allowed" clearly refer to an act of the government. In that case the following language, which by analogy is peculiarly applicable to the case under consideration, was employed:

McKelvey's desert-land entry was not "erroneously allowed." Upon the showing made by McKelvey and his witnesses in 1887, the local officers were bound by law to allow the entry. They would have erred if they had not allowed it. The entry was based upon McKelvey's allegation that the land was desert in character. The subsequent proceedings developed that the land was not desert in character, and that it would produce agricultural crops without artificial irrigation. This demonstrated that the entry was wrongfully obtained by the entryman, but it fell far short of demonstrating that the entry was "erroneously allowed" by the officers of the land department. They acted upon the proof presented by the entryman. The proofs presented required the allowance of the entry. The error in the transaction was in the presenting of such proof by the entryman, and not in the action thereon by the land office.

The deduction from the departmental decision just quoted is, that Steinhardt's entry was properly allowed upon the proof presented by him, and under the decision of the supreme court in the Budd case might have been confirmed. Hence, in the light of said supreme court decision the entry was not "erroneously allowed," but was *erroneously canceled*. In the case of E. C. Masten (*supra*), as in the case at bar, the entry was properly allowed upon the proof presented, but under the changed construction of the law, was erroneously canceled. The Department, without considering the specified cases in which repayment is authorized under the act, and on the ground that fraud had not been proven, held that Masten was entitled to have his purchase money repaid to him. But in the recent case of George A. Stone (25 L. D., 111), the decision in the case of E. C. Masten was held to be wrong, and was expressly overruled. In Stone's case the first decision, which was reaffirmed, is thus described:

The effect of the decision sought to be reversed is that where the land entered is not of the character contemplated by the law under which the entry is made, but is expressly represented by the entryman to be of that character, and the allowance of the entry is procured by such representation, the entry is wrongfully procured and is not "erroneously allowed" within the meaning of the repayment law.

For the reasons stated herein and in the departmental cases cited, your office decision of May 25, 1896, declining to approve Steinhardt's second application for repayment, is hereby affirmed.

ALASKAN LANDS—POSSESSORY RIGHTS—OCCUPANCY.

NAVAL RESERVATION.

The protection extended to possessory rights by section 8, act of May 17, 1884, is limited to lands actually used, occupied, or claimed, at the date of said act.

The mere occupancy of Alaskan lands, for the purpose of trade or manufacture, does not confer upon the occupant any right in the land, as against the government, that will constitute a legal obstacle to the reservation of the land so occupied for naval purposes.

Acting Secretary Ryan to the Secretary of the Navy, September 4, 1897.

(W. V. D.)

(W. M. W.)

On May 6, 1897, you addressed a communication to this Department respecting the enlargement of the naval reservation at Sitka, Alaska. The original reservation referred to was established by executive order, dated June 21, 1890, but its boundaries were modified and its area somewhat reduced by the President's order of November 14, 1896 (29 Stat., 883). It appears from your letter and the papers accompanying it that there is not land enough at Sitka under the control of the Navy Department to meet the requirements of the service at that place, and that it is of urgent importance that an addition be made to the reservation, in order that a suitable site may be afforded for certain public buildings required for use as officers' quarters there, for which an appropriation has recently been made by Congress.

With your letter you enclosed a tracing, showing the United States naval reservation at Sitka as changed by the President's proclamation of November 14, 1896, and also showing the tract which it is desired to have added to said reservation; said tract is marked on said tracing "lot 20-a," and adjoins the existing naval reservation on the southeast, and is reported to be an available site for the buildings desired. The tract proposed to be incorporated in the existing naval reservation at Sitka is at present claimed by occupants thereof. Respecting such occupancy your letter says:

The information possessed by this Department on the subject is to the effect that on a date not given, but subsequent to 1890, Julius C. Koosher, formerly apothecary of the U. S. Pinta, built a shanty on, and enclosed the tract, but no record of this occupation was made; the first record found is that of a quitclaim deed from J. C. Koosher to W. G. Jack, dated August 3, 1892; and that the tract has subsequently been and is still occupied by Read and Jack, who have erected a two-story frame building, for store purposes, thereon. This store building is represented to be in good condition, and its value is estimated at \$1,500.

You recommend:

That a proclamation be drafted in your (this) department, for submission to the President, setting apart for naval uses, and as an addition to the U. S. naval reservation at Sitka, Alaska, said tract of land described by metes and bounds as follows: Beginning at a stake at the southeastern corner of lot 20, occupied by the barracks building, the property of the United States Marine Corps, and situated on the north side of what is known as the parade ground, and running east 12 degrees, 30 minutes south 39 feet, thence north 27 degrees, 30 minutes east 76 feet, thence

west 27 degrees, thirty minutes north 39 feet, 2 inches, thence south 26 degrees, 30 minutes west 86 feet to the point of commencement, said tract being situated in the town of Sitka, Alaska.

You ask to be advised if there is any obstacle to carrying out your recommendation.

Your letter and accompanying papers were referred to the Commissioner of the General Land Office for report. On May 19, 1897, the Assistant Commissioner made such report, and called attention to, and enclosed a copy of, general order No. 6, issued by Brevet Major General Davis, dated at New Archangel, Alaska Territory, December 1, 1867; in which it was announced,

that until such time as the government of the United States shall decide, through the proper agents, what locations and amount of land may be required for government and territorial purposes, the following reserves are hereby declared, and the military authorities will hold and use them as such.

The order is divided into three paragraphs. The Commissioner of the General Land Office caused the lines of the reservation made by General Davis's order to be outlined on the plat submitted by your Department as approximately as can be determined from data in his office. An examination of said plat shows that much the greater portion of lot 20, as reserved by the President June 21, 1890, is included within the second paragraph of General Davis's order, and that more than half of "lot 20-a," now proposed to be reserved as an addition to "lot 20," is likewise within General Davis's reservation. Copies of the Commissioner's report and General Davis's general order No. 6 are herewith enclosed.

The conclusion which is hereinafter stated renders it unnecessary for me to consider or determine the effect of General Davis's order, but since a part of "lot 20-a" is included in the military reservation intended to be established by that order, you may prefer to submit the matter to the Secretary of War for his consideration and recommendation.

On the 5th of June, 1897, your Department transmitted a communication from Hon. George C. Perkins, enclosing a protest by A. Gerberding and Co. against the proposed extension of said reservation over the tract in question, on the ground that said firm "is the owner by purchase" of said tract and valuable buildings thereon, and closing by saying that: "If the Navy Department requires this property, it can be purchased at \$3,000—cost of lot and buildings."

The matter was referred to the Commissioner of the General Land Office for a report as to whether the tract in question has been disposed of by the United States.

Under date of July 14, 1897, the Commissioner reported: "That the tract of land in question is within the town of Sitka, but no entry or application to make entry of said tract has been received at this office." A copy of said report is herewith enclosed.

On July 22, 1897, counsel for A. Gerberding and Co. asked for time to be heard and to have their objections to the proposed reservation considered; thereupon counsel was given thirty days to make a showing and file argument in support of Gerberding and Company's protest.

On the 23d day of August, 1897, counsel's statement and argument on behalf of A. Gerberding and Co. were received by the Department. It is contended that the application of the Navy Department should not be granted, for the following reasons:

First: That such action as is requested would be unwarranted by law and could result only in litigation.

Second: That such action would be highly inexpedient as tending to unsettle almost all of the titles to land in the Territory of Alaska.

Third: That such action has not been shown to be really necessary, and in the absence of such necessity grave hardships should not be inflicted on innocent persons.

The facts upon which Gerberding and Co. claim the tract are stated by their counsel, substantially, as follows:

In 1891 the lot in question was in the possession of one Koosher, a naturalized citizen, who built a small house on it. In 1893 Koosher sold to R. E. Jack; in 1893 Jack erected a store building on the lot, costing \$2,200. In 1896 Jack conveyed it to Reid, Reid to Graf, and Graf to William Baehr, Jr., who is a partner in the firm of A. Gerberding and Co., for whom he holds the property. As to the time the lot was first occupied by Koosher, the claim of the protestants does not materially conflict with the facts submitted by your Department.

In support of the protest, it is contended that the act of May 17, 1884 (23 Stat., 24), debars the executive branch of the government from making the additional reservation now sought to be made. The case of *Miller v. Brackett* (47 Fed. Rep., 547), district court of Alaska, is relied upon by protestants as sustaining their contention. That was a case of ejectment to recover the possession of certain premises in the town of Juneau, Alaska. "No proof was made that the premises were ever reserved by the government for military or other purposes."

As applied to controversies between private persons, the correctness of this decision may not be open to serious objection, but as applied to the rights of the United States to the possession of public lands in Alaska, this Department would not feel bound by it, nor advise it to be followed.

The 8th section of the act of May 17, 1884 (23 Stat. 24), created the district of Alaska a land district of the United States, extended thereto the laws of the United States relating to mining claims; and the rights incident thereto, and provided:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

This is claimed by protestants as prohibiting the executive branch

of the government from reserving for public uses public lands in Alaska now used, occupied and claimed, but neither used, occupied nor claimed at the date of that act.

The language of the act does not justify the contention of protestants. It is not necessary to determine what the rights of protestants would be had they been using, occupying or claiming the land in question at the time said act was passed, for they only claim to have been using and occupying the tract in question since October 19, 1896, and that those under whom they claim first occupied the lot in 1891, some seven years after the act of 1884 was passed. By said act Congress evidently intended to protect and preserve rights to lands actually used, occupied or claimed at the date of the act. There is nothing in the language of the act to indicate that Congress intended to invite settlement upon the public lands in Alaska; on the contrary, it expressly excluded the general land laws from operation there.

Section 11 of the act of March 3, 1891 (26 Stat., 1095, 1099), provides that until otherwise ordered by Congress lands in Alaska may be entered for townsite purposes, for the several use and benefit of the occupants of such townsites, by such trustee or trustees as may be named by the Secretary of the Interior. Lot 20-a is in the town of Sitka, but no entry has been made of any townsite for the benefit of the residents of that town. It should be here stated that Sitka is not an incorporated town and has no municipal existence.

Section 12 of said act provides that certain applicants "now or hereafter in possession of and occupying public lands in Alaska, for the purpose of trade or manufacture, may purchase not exceeding one hundred and sixty acres."

Section 13 provides for the surveying, payment therefor, and the issuance of patents for such lands.

This land in lot 20-a has not been purchased, and so far as this Department is advised no application has ever been made to purchase the same.

The statute permitting the purchase of public lands in Alaska occupied for trade or manufacture, is, for the purpose of the question here presented, quite similar to the pre-emption law which permitted the settlement and occupation of public lands with a view to their subsequent purchase. It was repeatedly ruled and became well established that the mere occupation and improvement of public lands with a view to purchase under the pre-emption law, did not confer upon the settler any right in the land *as against the United States*. *Frisbie v. Whitney* (9 Wall., 187); *Yosemite Valley case* (15 Wall., 77).

In *Grisar v. McDowell* (6 Wall., 381), the supreme court says:

From an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public uses. The authority of the President in this respect is recognized in numerous acts of Congress.

The authority on the part of the President was considered by the Attorney General in an opinion rendered July 15, 1881 (17 Op. A. G., 160), wherein it was held that the occupation and improvement of the land in question by pre-emptors who had not paid for or entered the land could not prevent the inclusion of the same in a reservation by executive authority.

From a careful consideration of all the questions presented by the protest of A. Gerberding and Co., I conclude that such protest presents no legal objection sufficient to debar the President from ordering the additional reservation asked, if in his judgment this tract is required for such public purpose. The occupation and improvements of the protestants, while constituting no legal obstacle to the reservation, will no doubt receive due consideration in determining whether this particular tract should now be taken for the purpose named.

You ask that a proclamation be drafted, for submission to the President, setting apart the parcel of land in question as an addition to the United States Naval Reservation at Sitka, Alaska.

The original naval reservation at Sitka was made by an executive order signed by President Harrison. This manner is less formal than by proclamation, and answers the same purpose. Herewith I submit a draft of an executive order, which should be endorsed upon or securely attached to your letter of May 6, 1897, requesting the additional reservation to be made. After it is signed by the President, your letter, with the executive order and the tracing showing the reservation, submitted with your letter, should be returned to this Department for transmission to the General Land Office, to be noted on the records of that office.

MINING CLAIM—PROTEST—NOTICE—SUPERVISORY ACTION.

GOWDY ET AL. v. KISMET GOLD MINING CO.

A protestant against a mineral application, who fails to file his protest within the statutory period, will not be heard to say that he had no notice of said application, where due notice thereof, as required by the statute and regulations thereunder, has been given.

The Secretary of the Interior should not take action, under his supervisory authority, on the application of parties that have had full opportunity to protect their rights under the statutes and regulations.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 6, 1897.* (P. J. C.)

The history of this case will be found in 22 L. D., 624, and 24 Id., 191. For the purpose of disposing of this petition, it is only necessary to briefly state such facts as will make the present issue intelligible.

The owners of the Kismet gold mining claim (survey No. 8868, Pueblo, Colorado, land district) made application for patent for the same. Dur-

ing the period of publication of the notice of the application, *Gowdy et al.*, alleged owners of the Chicago Girl lode mining claim, did not file a protest and adverse; but after the period of publication had expired they filed a protest, alleging that the notice of application for patent was not posted in a conspicuous place on the claim, and that the published notice did not contain the names of adjoining claims.

The matter finally reached the Department, and on May 23, 1896 (22 L. D., 624), decision was rendered, in which it was held that the notice was conspicuously posted, but that the notice of publication did not contain all the data required by the rules and regulations. The order was, that a new publication should be made.

In passing upon the status of the protestants, it was said in that case—

It is not charged by the protestants that they did not have notice of the application for patent. All they claim is that some of the claimants of the *Kismet* assured some of them "that they were not claiming and would not claim any portion of the ground in conflict," and relying upon this verbal promise they did not protect their interest by adverse proceedings. If it be granted that such assurances were made, this would not excuse the protestants from taking the course prescribed by statute for their own protection.

In the absence of any showing to the contrary, when publication and posting have been made, the Department must assume that all adverse claimants had notice thereof, and if they fail to protect their interests, the Department can not relieve them, when there has been a substantial compliance with the law as to the notices.

This question was discussed at some length, and it was decided that the only matter the Department could

determine in this proceeding is as to whether the notice was posted on the claim as required by law and the rules, and whether the publication notice is in conformity therewith. And this is solely a matter between the government and the entryman.

Motion for review of this decision was denied (23 L. D., 319). Subsequently a motion for a re-review was presented, the same was entertained, and on February 27, 1897 (24 L. D., 191), the former decision was modified to the extent only of holding that there had been a substantial compliance with the rules and regulations, as construed by your office, in the publication notice; and the order requiring re-publication was revoked.

In relation to the protestants, in this latter case, it was said—

The Department has no intention of receding from the position taken in this case originally as to the status of the protestants. In the case presented at that time it was not charged or shown that they did not have notice of the application for patent, and the ex parte affidavits now presented, alleging that they did not have notice, come too late for consideration, under the doctrine announced in *Peacock v. Shearer's Heirs*, 20 L. D., 213; and *Tennessee Coal, Iron and Railroad Company et al.*, 23 id., 28.

It will be observed that the last case decided is only a modification of the former, in relation to the contents of the publication notice. The reasons assigned for this are given at some length, and it is not deemed necessary to again discuss the question.

The theory upon which my predecessor acted in this matter was

evidently that this was solely a matter between the applicants for patent and the government. The failure of the protestants to file their adverse within the proper time, and thus test their right to the land by a proceeding provided by law, did not give them such a standing before the Department as would warrant it in considering any other matter than as to whether or not there had been a compliance with the law and regulations in the matter of their application for patent. In other words, the protestants were regarded as appearing merely as *amicus curiae*, calling the attention of the Department to the failure to comply with the regulations.

In the later case, the status of the protestants, as fixed by the former, was adhered to, and the affidavit filed by Gowdy, stating that he did not have notice of the application for patent was disregarded, for the reason that it came too late, under the authorities, to cure an alleged defect in their original protest.

The present petition of the protestants, invoking the supervisory power of the Secretary of the Interior, while it states seventeen grounds of error in the decision of February 27th, yet it may with fairness be summarized into one proposition, that is, that the affidavit of Gowdy should have been accepted "as supplementing and perfecting his said protest and as establishing the want of notice of the Kismet application for patent, in himself and his co-owners of the Chicago Girl lode claim"; that by reason of this affidavit the protestant's status was "materially strengthened", and that the order of publication of the Kismet application, in the decision of May 23rd, should not have been overruled by the later decision.

The prayer of this petition is, "that the Department ought to do one of three things, viz: "

(1) It ought to revoke its decision of February 27, 1897, and reinstate the decision of May 23, 1896, in order that our clients, the senior locators, may have their day in court.

(2) Or it ought to order a hearing in this case to determine whether protestants had notice, and the truth of allegations contained in their protests, and require republication in the event that protestants establish their allegations.

(3) Or it ought to revoke its decision of February 27, 1897, and modify its decision of May 23, 1896, so as to give force to the regulation in question in all *contested* or *protested* case, leaving its enforcement in *ex parte* cases to the discretion of the Commissioner.

It has been decided in this case that there was a proper posting of the notice of application for patent, and the correctness of this ruling is not questioned. It has also been determined that the notice by publication was a substantial compliance with the regulations as construed and acted upon by your office. Hence, all the notice required by statute and the rules and regulations was given. It therefore follows, I think, that the protestants can not be heard to say that they had no notice of the application for patent. Everything that was required to be done, to give notice, was done; and if it be admitted

that the protestants did not actually have notice of the pending application, they should, for all purposes, be charged with constructive notice. When the conditions of the law have been fulfilled, nothing further can be required by the Department. The parties are charged with notice, and must protect their interests as required by the statutes.

It is of course contended by counsel that the first decision in this case was right, and that the second one deprives them of any remedy they may be entitled to as against the Kismet.

In answer to that, it may be said that the protestants did not bring themselves within the rulings of the Department in the first instance, in that they did not claim that they were ignorant of the fact that the application for patent was pending; and in the absence of an affirmative allegation of this fact, the presumption would naturally be that they did have notice; and this presumption is strengthened, in my judgment, by the language quoted in the decision of May 23rd. But whether this be true or not, the fact is, that the protestants were, as stated hereinbefore, charged with notice of the pendency of the application.

Without attempting to say what my predecessor would have done in the premises had there been a showing made that protestants did not actually have notice of the pending application, it is sufficient, for the purpose of disposing of this petition, to say, that it was within what is now conceived to be the correct ruling, that is, that they appeared only as *amicus curiae*, and that it was not error to hold, in the absence of an affirmative allegation that they did not have notice, that they would not be heard as to their alleged prior right. Their subsequent attempt to bring themselves within the rule, after the decision had been promulgated, was unavailing, under the rulings of the Department. If the Department should permit parties to come in after a case is decided, and by affidavits cover the objections in the original case, thus doing that which they should have done in the first instance, there would never be an end to the cases that are brought here for adjudication.

On March 4, 1897, Gowdy, for himself and his co-owners, filed in the local office a further protest against the issuance of a patent to the Kismet, which has been forwarded to this Department for action in connection with the petition under consideration.

This protest alleges fifteen grounds of objection, which are substantially a history of the location of the Chicago Girl, showing it to have been prior to the Kismet; reciting the application for patent for the Kismet; that \$500 worth of labor and improvements had not been placed upon the Kismet at the time of the application; that neither the protestant nor any of his co-owners had any knowledge of the application for patent filed by the Kismet until after the period of publication had expired; that they resided within thirty miles of the said claims; that they had no means of knowing the conflict between the claims; that they relied upon the seniority of their location and upon the rules and regulations to the effect that applications must refer

in their notices to the adjoining and conflicting claims; that they are informed and believe that the parties interested in the Kismet claim had knowledge of the conflict of the Chicago Girl claim, and that they intentionally omitted reference thereto from their notice, in order that they might wrongfully acquire title to the ground in controversy; and that the publication notice did not comply with the requirements laid down in paragraphs 29 and 35 of the mining circular of December 10, 1891.

It will be observed that these charges are all substantially the same as those made in the original protest, with the single exception of their want of notice of the application for patent. All of these questions have heretofore been ably presented by counsel, both in written briefs and oral arguments, and have been given mature deliberation, after which they were decided adversely to the contention of protestants.

It seems to me that the supervisory powers with which the Secretary of the Interior is clothed, in the matter of the disposal of the public lands, should not extend to the point of taking action in a matter like this, where parties have had abundant opportunity to protect their rights under the statutes and regulations.

This appeal to the supervisory power is really more in the nature of a petition for review of the decision of February 27th, and might well be so denominated; it is asking that the former decision of the Department be overruled for errors alleged to exist in said decision. Upon consideration this contention is found to be without support. There is no direct charge of fraud, either on the part of the applicants for patent to the Kismet lode or any officers of the Department, in making the survey, or otherwise, in connection with the entry. It seems to me, therefore, that there is nothing presented by this petition which would justify the exercise of the supervisory power of the Secretary of the Interior.

The fact that the Chicago Girl was not mentioned in the advertisement as conflicting with the Kismet lode, was not fatal to the advertisement, under the rulings of the Department at that time. The universal custom that prevailed, in mentioning conflicting claims as prescribed by paragraph 29, was only to mention those for which patent had been applied for, or of which there had been an official survey; and it has been decided by the Department in *Whitman et al. v. Haltenhoff et al.* (19 L. D., 245), that the mentioning of the number of the survey was a sufficient compliance with the rules. Experience has demonstrated that this was not a wise thing to do; hence my predecessor amended paragraph 29, in the decision of February 27th, so as to make it more specific and definite in this, as well as in other respects.

The petition will be denied and the papers sent to the files of your office.

ARID LAND ACT—SETTLEMENT RIGHT.

MARGARET D. GILLIS.

The withdrawal of arid lands under the act of October 2, 1888, did not affect or impair rights acquired by settlement and pre-emption filing prior to the passage of said act.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *September 7, 1897.* (C. J. G.)

The record in this case shows that on March 30, 1888, Margaret D. Gillis filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 29, T. 9 N., R. 11 E., Helena land district, Montana, alleging settlement March 20, 1888.

By your office letter of July 6, 1890, in pursuance of instructions contained in departmental letter of March 13, 1890, certain lands in said township were withdrawn for reservoir purposes under the act of October 2, 1888 (25 Stat., 526). The said instructions were based upon the recommendation of the Director of the United States Geological Survey, who had, on January 8, 1890, designated and selected said lands for reservoir purposes. This withdrawal, which was for reservoir site No. 12, included the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, a part of the lands covered by the pre-emption filing of Mrs. Gillis.

On July 3, 1890, Mrs. Gillis transmuted her said filing to a homestead entry. In a petition filed in reply to your office decision of February 26, 1896, calling upon her to show cause why her said homestead entry as to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ should not be canceled for conflict with reservoir site No. 12, Mrs. Gillis states that she transmuted her filing to homestead because she had expended all her means in improving said land and could not afford to purchase under the pre-emption law; that her improvements were of the value of \$400, and consist of house, garden, grain patch, ditch, currants, goose-berries and strawberries; that the cancellation of her entry to the extent contemplated would be of incalculable injury to her in her advanced age; that this is her only home and she begs to be permitted to retain it.

By your office decision of May 9, 1896, the said petition of Mrs. Gillis was denied and her homestead entry to the extent of the conflict with the reservoir site was held for cancellation.

An appeal from this action brings the case to this Department.

The substance of the various letters of your office, together with the instructions of this Department, relative to these lands, are set out in your said office decision from which the appeal is made. The act of October 2, 1888 (*supra*), is as follows:

And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are

from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

The act of August 30, 1890 (26 Stat., 391), repealed so much of the act of October 2, 1888, as withdrew from settlement and occupation "all lands made susceptible of irrigation by such reservoirs, ditches or canals." The said act of October 2, 1888, was subsequently amended by section 17 of the act of March 3, 1891 (26 Stat., 1095), which provided:

That reservoir sites located and selected and to be located and selected under the provisions of the act of October 2, 1888, and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

It has been held that the act of October 2, 1888, took effect at the date of its passage, and that it applied to all lands which might thereafter be designated or selected until further provided by law. Amanda Cormack (18 L. D., 352). Mrs. Gillis was an actual settler on the land in question at the date of the location of reservoir site No. 12, and as such her said land was excluded from the site of said reservoir "so far as practicable." Not only this, she was a *bona fide* settler and occupant of said land prior to the passage of the act of October 2, 1888. Hence, the rights thus secured antedated said act and were not impaired by the subsequent withdrawal of said land for reservoir purposes. In the case of Sjune Bondeson (22 L. D., 520) it was held (syllabus):

The act of October 2, 1888, providing for the withdrawal of arid lands did not contemplate the impairment of rights acquired prior to its passage through *bona fide* settlement and occupancy, and it therefore follows that a pre-emption settlement and filing made prior to the date of said act may be carried to entry and patent subsequently thereto.

It was stated in said case that "Congress did not intend by the act of October 2, 1888, to impair the rights which had accrued prior to its passage, by reason of *bona fide* settlement and occupancy."

"Shall not be subject after the passage of this act to entry, settlement or occupation" are the words of the statute; and they plainly imply a recognition of the rights incident to occupation, settlement or entry prior to the passage of the act.

Accompanying the appeal to this Department is a numerously signed petition setting forth that reservoir selection No. 12 is not only not demanded by the best interests of the persons affected thereby, but that such selection would be a positive injury to the property of such persons. In view of the conclusion reached herein it will be unnecessary to consider said petition in this connection.

Your office decision of May 9, 1896, is hereby reversed, Mrs. Gillis' homestead entry embracing the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, T. 9 N., R. 11 E., will be held intact, and if otherwise regular patent will issue therefor.

RAILROAD GRANT—ACCEPTANCE OF CONSTRUCTED ROAD.

SOUTHERN PACIFIC R. R. Co.

By the terms of the joint resolution of June 28, 1870, the Southern Pacific company was authorized to construct its road along the route indicated by the map of January 3, 1867, and entitled to have the road accepted, if so constructed, but the acceptance of said road will not determine conflicting rights or claims within the grant.

The report of the commissioners as to the construction of the Southern Pacific railroad, as provided for in said joint resolution, must be made to the Secretary of the Interior, and does not require the approval of the President.

A lease of a portion of the constructed road of the Southern Pacific to the Atlantic and Pacific company can not be accepted as a valid basis for a claim on the part of the latter company, that it has, under the provisions of sections 3, and 17, of the act of July 27, 1866, thereby earned its grant opposite said constructed road.

The map of January 3, 1867, was not filed as a map of definite location, but rather as a map of general route, and a deflection from said route, in the construction of the road, made necessary on account of engineering difficulties, and to secure a more feasible route, does not warrant the rejection of the road thus constructed.

Secretary Bliss to the Commissioner of the General Land Office, September 8, 1897. (W. V. D.) (F. W. C.)

In a letter from your office dated November 20, 1890, asking instruction in the matter of the adjustment of the grant to the Southern Pacific Railroad Company, in view of the forfeiture declared by the act of September 29, 1890, of all lands opposite the unconstructed part of any railroad to aid in the construction of which a grant had been previously made, it was said:

Between Tres Pinos and the point referred to (Alcalde) there is no evidence of construction, nor is there any evidence of the construction from Mojave to the Colorado River, at The Needles, although it is understood that, between said last mentioned points, the road has been constructed, and that the report of the Commissioners upon the construction is now pending before the Department and has been since 1883. In preparing diagrams showing the lands forfeited, and in making the restoration provided for in the act, it becomes necessary to determine what portions of the road were not completed and in operation at the date of the passage of the act. To do this, it must first be determined what portions of the road were constructed in accordance with law, and to this end I have to ask instructions upon the road from Mojave to The Needles. In this connection, I have to call attention to the fact that the withdrawal now existing between said points is upon the location of 1867 before referred to.

Relative to the portion of said road between Mojave and The Needles, I have to advise you that by letter of January 6, 1885, the resident counsel for the Southern Pacific Railroad Company transmitted the favorable report made by commissioners appointed by the President on December 3, 1884, to examine the portion of said road between Mojave and The Needles, a distance of 242,507 miles, together with an affidavit by the President of the company, to the effect that the road as constructed is as near as may be upon the route indicated upon the map filed January 3, 1867, and in said letter requested that the report and accompanying papers be forwarded to the President for his action.

Against the acceptance of said report the Atlantic and Pacific Railroad Company filed a protest on January 10, 1885, alleging, in effect, (1) that between Mojave and The Needles the constructed line of the Southern Pacific Railroad is practically identical with the located line of the Atlantic and Pacific Railroad, and (2) that the Atlantic and Pacific Railroad Company has the prior right to the land grant so far as it is in conflict.

Each of the parties was granted time within which to file briefs in support of their respective rights, and the record as thus made is very voluminous.

It appears that no action has ever been taken upon said report made by the commissioners appointed to examine the constructed road above described, except, that in 1891, the entire matter was referred to the First Assistant Secretary, for examination and report, and on April 4, 1891, Assistant Secretary Chandler made report in which he states "it is my judgment that the company is entitled to have the report (the report of the commissioners) approved."

Upon this report the then Secretary (Mr. Noble) does not appear to have acted, nor has any action since been taken.

A brief recital of the legislation relative to the grants for the Atlantic and Pacific and the Southern Pacific Railroads is necessary in the consideration of the protest filed by the Atlantic and Pacific Railroad Company and in determining what action is necessary to be taken upon the report made by the commissioners appointed to examine the constructed road under consideration.

By act of Congress approved July 27, 1866 (14 Stat., 292), the Atlantic and Pacific Railroad Company was incorporated and a grant of lands was made to aid in the construction of the road therein provided for, which is as follows:

Beginning at or near the town of Springfield, in the State of Missouri, thence to the western boundary line of said State, and thence by the most eligible railroad route as shall be determined by said company to a point on the Canadian River, thence to the town of Albuquerque, on the River of Del Norte, and thence, by way of Agua Frio, or other suitable pass, to the head-waters of the Colorado Chiquito, and thence, along the thirty-fifth parallel of latitude, as near as may be found most suitable for a railway route, to the Colorado River, at such point as may be selected by said company for crossing; thence by the most practicable and eligible route, to the Pacific.

Said act after making the grant of lands provided:

That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act: *Provided further*, That the railroad company receiving the previous grant of land may assign their interest to said "Atlantic and Pacific Railroad Company," or may consolidate, confederate, and associate with said company upon the terms named in the first and seventeenth sections of this act.

The 4th section of said act provides:

That whenever said Atlantic and Pacific Railroad Company shall have twenty-five consecutive miles of any portion of said railroad and telegraph line ready for the service contemplated, the President of the United States shall appoint three commissioners to examine the same, who shall be paid a reasonable compensation for their services by the company, to be determined by the Secretary of the Interior; and if it shall appear that twenty-five consecutive miles of said road and telegraph line have been completed in a good, substantial and workmanlike manner, as in all other respects required by this act, the commissioners shall so report under oath, to the President of the United States, and patents of lands, as aforesaid, shall be issued to said company, confirming to said company the right and title to said lands situated opposite to and coterminous with said completed section of said road. And from time to time, whenever twenty-five additional consecutive miles shall have been constructed, completed, and in readiness as aforesaid, and verified by said commissioners to the President of the United States, then patents shall be issued to said company conveying the additional sections of land as aforesaid, and so on as fast as every twenty-five miles of said road is completed as aforesaid.

By the 18th section of said act a grant of lands was made to the Southern Pacific Railroad Company. Said section reads:

That the Southern Pacific Railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific Railroad, formed under this act, at such point, near the boundary line of the State of California, as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations, as to time and manner, with the Atlantic and Pacific Railroad herein provided for.

According to the articles of incorporation of the Southern Pacific Railroad Company, it was authorized to build a railroad—

from some point on the Bay of San Francisco, in the State of California, through the counties of Santa Clara, Monterey, San Luis Obispo, Tulare, Los Angeles, and San Diego, to the town of San Diego, in said State, thence eastward through the county of San Diego to the eastern line of said State of California, there to connect with the contemplated railroad from said eastern line of the State of California to the Mississippi river, etc.

On January 3, 1867, the Southern Pacific Railroad Company filed in this Department a map showing the location of the line of its road under the act of 1866 (*supra*).

According to this location the road was to extend from San Francisco southeastwardly in the direction of Mojave, and thence eastwardly to a point on the eastern boundary of the State, on the Colorado River, a few miles below the Needles.

Upon this location the lands within the prescribed limits of the grant were withdrawn March 26, 1867.

Afterwards a question was raised as to the authority of the Southern Pacific Railroad Company to make the location shown upon the map of 1867, as it did not conform with the route provided for in the articles of association, and the order of withdrawal was first revoked; then that

order was suspended. Thereafter the withdrawal was again revoked and again the order of revocation was suspended, and thus the matter stood when Congress by the joint resolution approved June 28, 1870 (16 Stat., 382), provided:

That the Southern Pacific Railroad Company of California may construct its road and telegraph line, as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the third day of January, eighteen hundred and sixty-seven; and upon the construction of each section of said road, in the manner and within the time provided by law, and notice thereof being given by the company to the Secretary of the Interior, he shall direct an examination of each such section by commissioners to be appointed by the President, as provided in the act making a grant of land to said company, approved July twenty-seventh, eighteen hundred and sixty-six, and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, to the extent and amount granted to said company by the said act of July twenty-seventh, eighteen hundred and sixty-six, expressly saving and reserving all the rights of actual settlers, together with the other conditions and restrictions provided for in the third section of said act.

By letter of October 25, 1869, the President of the Atlantic and Pacific Railroad Company transmitted to this Department a plat designating the line of that road from the crossing of the Colorado River to the Pacific Ocean, upon which it was requested that a withdrawal be ordered.

This Department refused to accept the location shown upon said map, and the request for a withdrawal was denied. On August 15, 1872, another location was filed which was duly accepted and withdrawal ordered thereon.

It might be here stated that by the act of Congress approved July 25, 1868 (15 Stat., 187), it was provided:

That the Southern Pacific Railroad Company of the State of California shall, instead of the times now fixed by law for the construction of the first section of its road and telegraph line, have until the first day of July, eighteen hundred and seventy, for the construction of the first thirty miles, and they shall be required to construct at least twenty miles every year thereafter, and the whole line of their road within the time now provided by law.

The Southern Pacific Railroad Company began the construction of its road at San Jose, the section ending at Gilroy (30.26 miles) being constructed during the year 1870.

Twenty miles southeast from Gilroy, ending at Tres Pinos, was constructed during the following year.

The company then began at Goshen, building southeastwardly to Mojave, and afterwards from Goshen to Coaligna.

The above mentioned road has been duly accepted.

Aside from the merits of the contention made by the Atlantic and Pacific Railroad Company, it seems to me to be clear, that after the resolution of 1870 no question could be raised as against the right of

the Southern Pacific Railroad Company to build along the route indicated upon the map of 1867, and if so built that the road should and must, under the terms of that resolution, be accepted.

The acceptance of the road as constructed will not determine conflicting rights or claims, within the grant, and in my opinion the protest by the Atlantic and Pacific Railroad Company is not sufficient cause for further suspending action upon the report of the commissioners, who were appointed not to determine priorities within the grant, but whether the road was constructed as required by law.

The resolution of 1870 provides—

and upon the report of the commissioners to the Secretary of the Interior that such section of said railroad and telegraph line has been constructed as required by law, it shall be the duty of the said Secretary of the Interior to cause patents to be issued to said company for the sections of land coterminous to each constructed section reported on as aforesaid, etc.

These commissioners were not required to report to the President, as were those provided for in the act of 1866, and I can see no good reason for submitting their report to the President for approval. It is clear the resolution does not require it.

It has been the practice, so I learn, to submit the reports made by commissioners under the resolution of 1870 for approval by the President, and the remaining sections of constructed road have been accepted in this manner.

The commissioners were required to report to the Secretary of the Interior, and while his approval of said report is not specifically required, yet there can be no doubt that the power exists, if sufficient reasons appear, to reject the report, or to refuse to patent lands on account thereof, which it is otherwise made the duty of the Secretary of the Interior to do, upon receipt of a favorable report from the commissioners duly appointed to examine the road.

This would seem to have been the view entertained by the then Secretary (Mr. Teller), for he entertained the protest filed by the Atlantic and Pacific Railroad Company before referred to.

Relative to said protest, which was based upon an adverse claim to the grant, set up by the Atlantic and Pacific Railroad Company, I have but to say that, by the act of July 6, 1886 (24 Stat., 123), its grant opposite unconstructed road was forfeited, and in the case of said company against Mingus (165 U. S., 413) the forfeiture act was maintained.

Following the act of forfeiture, resident counsel for the Atlantic and Pacific Railroad Company filed a paper in which attention is called to a contract of purchase made between the Southern Pacific and the Atlantic and Pacific companies, together with lease of the portion of the Southern Pacific under consideration, which it was claimed, in effect, brought this portion of the road under the provisions of the 3d and 17th sections of the act of July 27, 1866 (*supra*), "and carries with it all land grant rights."

A reading of the sections referred to is enough to show that this claim is not a sufficient cause for refusing to accept the road as reported.

The provision in the 3d section is for consolidation with any railroad found upon the same general line provided for in the act of 1866, which had been, prior to 1866, aided with a land grant, and the provision was made to guard against a double grant for parallel lines upon the same general route. The 17th section authorized the Atlantic and Pacific Railroad to accept other grants, donations, loans, etc., whether from Congress, the legislature of any State, or an individual.

I do not mean to be understood as holding that consolidation could not be made under the act of 1866 with a railroad not aided by a land grant, nor that the Southern Pacific after earning its grant might not transfer it to the Atlantic and Pacific Railroad Company, but the condition here presented is that of two companies claiming grants under the same act, viz., July 27, 1866, and as located these grants overlap, being for a long distance upon the same general route. It was never the intention of Congress to provide a means by which both grants could be earned by the building of but one road.

Between the points named the road was constructed by the Southern Pacific Railroad Company and duly examined as a part of that road. It is not my purpose to at this time determine whether said company is entitled to a grant under the act of 1866, for I learn that this question is now involved in a suit pending in the courts, brought by the United States, to quiet the title to the lands claimed by the Southern Pacific Railroad Company along this portion of the road, where overlapped by the limits of the grant adjusted to the location made by the Atlantic and Pacific Railroad Company in 1872.

I am clear, however, upon the proposition that the subsequent leasing of this portion of the line by the Atlantic and Pacific Railroad Company can not be made the basis for supporting the claim of the Atlantic and Pacific Railroad Company that thereby its grant under the act of 1866 was earned opposite to said constructed road. Its protest is therefore overruled, and its application formally made for the examination of said road as a part of the Atlantic and Pacific Railroad, by commissioners to be appointed by the President, is denied.

It but remains to be considered whether the road, as constructed, should be accepted, there being, towards the eastern boundary of the State, quite a deflection to the south of the location shown upon the map filed January 3, 1867.

The resolution of June 28, 1870 (*supra*), merely authorized the Southern Pacific Railroad Company to construct its road, "as near as may be, on the route indicated by the map filed by said company in the Department of the Interior on the 3d day of January, eighteen hundred and sixty-seven."

The facts calling for such legislation must be considered when determining the scope of the legislation.

The map of 1867 was not filed as a map of definite location, but rather as a map of general route.

This Department had held that the route indicated upon said map was not possible under its State charter, and thereupon revoked the withdrawal ordered upon said route.

The passage of the resolution was therefore to permit the construction along the general route indicated and not to restrict the company to the exact location shown upon said map.

This Department has never treated the line of 1867 as the definite location of the road, but has adjusted the limits of the grant to the road actually constructed.

The variance between the line of 1867 and the road as constructed is but slight, except between Daggett and Goffs.

In explanation of the change between these points the chief engineer of the company, in an affidavit made March 23, 1891, alleges:

That going easterly from Daggett to Goffs it was at first proposed to follow up the course of the Mojave River and pass through the range of mountains known as the Providence Mountains, but on making further surveys to the southward it was found that there was a more feasible and practicable route, leaving the Mojave River near Daggett and passing to the southward of the Providence Mountains, and that by the adoption of such more southerly route the length of the line would be shortened by about three and a half miles, and the grades and curves could be reduced from the common use of grades of 116 feet to the mile, deflecting locally from the general route to fit the sides of the mountains to be crossed, and necessitating the use of sharp curves (thus raising to the maximum not only the cost of construction of the road but also the cost of transportation of merchandise over the road when constructed), to grades of but fifty-three feet per mile rising east and seventy-four feet per mile rising west, with easy curves and long tangents or straight distances of track, and that for this reason the route upon which the said railroad was constructed was adopted. That such route is a more feasible and practicable route than that shown on the map filed January 3, 1867, and that between Daggett and the Needles there are no private interests that are not as well served by one route as by the other and the public in general are very much better served by the line as constructed than they would have been by a railroad constructed upon the line shown on the said map.

In view of the favorable report made by the commissioners, and for the reasons above given, I have determined to accept the report and approve of the road as constructed.

CONTEST—PROCEEDINGS BY THE GOVERNMENT.

GRAY v. POPKESS.

Where the government, in its own behalf, has taken steps looking to the cancellation of an entry, pending final action thereon, a contestant can gain no right by filing a contest, in the event the government cancels the entry as the result of its own proceedings.

Secretary Bliss to the Commissioner of the General Land Office, September 8, 1897. (W. V. D.) (E. M. R.)

This case involves section 23, T. 36 S., R. 12 W., Salt Lake City, Utah, and is before the Department upon appeal by L. H. Gray from your

office decision of April 14, 1896, dismissing his contest against the desert land entry by Maria A. Popkess, of this tract.

The record shows that on May 11, 1889, Maria A. Popkess made desert land entry for the land involved. February 10, 1894, this entry was canceled for failure to make proof within the statutory period.

May 4, 1894, an application having been made for re-instatement, your office granted the same and allowed the entryman ninety days within which to make such proof, "failing to do which the entry will again be canceled."

May 9, 1894, due service of the above decision upon the attorney of Maria Popkess, was had.

October 17, 1894, the local office informed your office that no action had been taken by the entryman and recommended that the entry be again canceled.

March 9, 1896, this appellant filed corroborated affidavit of contest alleging that proof had not been made within the time allowed by law; that the land had never been reclaimed, and was in its natural condition.

April 14, 1896, your office decision canceled the entry of Popkess and held that as the entry was canceled the contest of Gray would not lie. From this action, as heretofore stated, appeal has been taken.

It will be noticed that at the time the application to contest was made, the ninety days given the entrywoman within which to submit proof had expired without any action upon her part, and that in pursuance of your office decision of May 4, 1894, stating that if proof was not furnished within the period specified the entry would again be canceled, the local office so recommended on October 17, following. The entry, however, was not formally canceled by your office until the decision from which appeal is taken. Under these circumstances is the position of the appellant well taken?

In the Spencer case (2 L. D., 785), it was said by the then Commissioner of the General Land Office, page 786:

Experience has shown that frequent efforts are made to take advantage of a knowledge of facts revealed by the special agent's investigation, to found a contest thereon, and that in other cases parties to fraudulent entries endeavor to protect the same against the investigation through the institution of collusive contests.

This was the first expression of a principle which has since been often followed. In *ex-parte Bullen* (8 L. D., 301), Secretary Vilas re-affirmed this view. See also *ex-parte Stearns* (*idem.*, 573), and *United States v. Scott Rhea* (*id.*, 578). The general principle deduced from these and similar authorities, is that where the government in its own behalf has taken steps looking to the cancellation of an entry, pending final action thereon, a contestant can gain no rights by filing a contest, in the event the government cancels the entry as a result of its own proceedings.

So in the cause at bar, the entry was canceled and then reinstated for a period of ninety days for the purpose only of allowing the entryman to furnish proof, and it was specifically stated therein that if the

proof was not furnished within that period, the entry would be canceled. The time having passed without action by the entryman, it was evident from the terms of your decision granting the extension that the entry would be canceled. This contestant, therefore, cannot be allowed to take advantage of this knowledge and, under pretence of commencing a contest against the entry, acquire a preference right thereon.

I am of opinion that the decision of your office was correct and the same is accordingly affirmed.

DESERT ENTRY—PRICE OF LAND.

KATE G. ORGAN.

The price of desert lands within the limits of a railroad grant, entered under the act of March 3, 1877, is not affected by the act of March 3, 1891, and such lands can only be patented on the payment of the double minimum price.

Secretary Bliss to the Commissioner of the General Land Office, September 8, 1897. (W. V. D.) (G. B. G.)

Kate G. Organ has appealed from your office decision of May 6, 1896, requiring supplemental payment of one dollar and twenty-five cents per acre on desert land entry No. 3651, made April 12, 1890, for the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 22, T. 14 N., R. 66 W., Cheyenne, Wyoming.

Appellant complains:

First. That the laws of the United States authorize the issuance of patent for such desert claim upon payment of the sum of \$1.25 per acre.

Second. That claimant has made final proof upon said claim, which has been accepted by the land department, and that she paid the purchase price therefor as required by said department, and that she holds a final receipt therefor.

That claimant has complied with all the requirements of law in the premises, and is entitled without further payment to a patent for said described lands.

The record shows that on July 26, 1893, your office rejected the final proof offered by Miss Organ upon her desert land entry, for the reason that "only two hundred dollars was tendered as payment for the land."

On appeal, the Department reversing the decision of your office said:

It is true that the initial entry was made prior to the act of March 3, 1891 (25 Stat., 1095-6-7); but that act provided that in case of all desert land entries in existence at that date, "upon payment to the receiver of the additional sum of one dollar per acre of said land a patent shall issue therefor to the applicant or his assigns." In the case at bar, final proof was made on June 22, 1893, subsequently to the passage of the act above cited; hence it is subject to the provisions of said act. (See case of Robert J. Gardinier, 19 L. D., 83.)

The decision of your office, in so far as it demands more than one dollar and a quarter per acre as the total amount to be paid for said land, is reversed. 20 L. D., 406.

It does not appear why this entry did not pass to patent on the authority of said decision.

On May 6, 1896, your office, without reference to said departmental decision, again suspended said entry for supplemental payment of one dollar and twenty-five cents per acre, on the authority of the decision of the supreme court, in the case of the United States *v.* Healey, 160 U. S., 136, and it is of this that the appellant now complains.

This action on the part of your office was irregular. It was the duty of the Commissioner to carry out the decision of the Department. If said decision was believed to have been in violation of a rule of law as subsequently announced by the supreme court, it was the duty of the Commissioner to have called the attention of the Department to that fact, and asked for instructions in the premises. If the departmental decision was wrong, however, in the light of the supreme court decision, your action of May 6, 1896, was not reversible error.

The land embraced in this entry is within the granted limits of the Union Pacific Railroad. The entry was made on April 12, 1890, under the desert land act of 1877.

In the case of the United States *v.* Healey (*supra*), it was said:

It results that prior to the passage of the act of 1891, lands such as those here in suit, although within the general description of desert land, could not properly be disposed of at less than \$2.50 per acre. Was a different rule prescribed by that act in relation to entries made previously to its passage?

If it be true, as seems to have been held by the Interior Department, that the act of 1877, as amended by that of 1891, embraces alternate reserved sections along the lines of land-grant railroads that require irrigation in order to fit them for agricultural purposes—upon which question we express no opinion—it is necessary to determine whether a case begun, as this one was, prior to the passage of the act of 1891 is controlled by the law as it was when the original entry was made. This question is important in view of the fact that the appellee's entry was made under the act of 1877, before it was amended, and his final proof was made after the act 1891 took effect.

We are of opinion that the act of 1891 did not authorize the lands in dispute to be sold at \$1.25 per acre, where, as in this case, the proceedings to obtain them were begun before its passage.

I am constrained to follow this decision and to hold that it disposes of appellant's case. Claims initiated under the desert land act of 1877, before the passage of the amendatory act of 1891 can only be completed on the payment of two dollars and fifty cents per acre, as provided by the first named act.

The Secretary of the Interior has jurisdiction over the public lands until patent issues, and it is his duty to see that they are disposed of only in accordance with law. The payment of two dollars and fifty cents per acre is a condition precedent to the acquisition of title to such alternate reserved lands entered under the act of 1877, and until that condition has been complied with, I am without authority to patent the land.

The decision appealed from is affirmed.

MINING CLAIM—RAILROAD GRANT—SCHOOL GRANT.

PACIFIC COAST MARBLE CO. *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws.

Lands valuable only on account of the marble deposit contained therein are subject to placer entry under the mining laws.

Lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, are "mineral lands" within the meaning of that term as used in the exception from the grant to the Northern Pacific Company for railroad purposes, and to the State for school purposes.

The case of *Tucker v. Florida Railway and Navigation Co.*, 19 L. D., 414, overruled.

Secretary Bliss to the Commissioner of the General Land Office, September 9, 1897. (W. V. D.) (A. B. P.)

The land involved in this controversy includes parts of sections 14, 15, 16, 21, and 22, T. 28 N., R. 36 E., W. M., Spokane, Washington. The portions thereof which lie in sections 15 and 21, are claimed by the Northern Pacific Railroad Company, by virtue of its list, No. 7, of indemnity selections, under its grant of July 2, 1864 (13 Stat., 365). That portion which lies in section 16, is claimed by the State of Washington, under its grant for school purposes, by the act of February 22, 1889 (25 Stat., 676, sections 10 and 18). The whole thereof—embracing 120 acres—is claimed by the Pacific Coast Marble Company, under its application for patent filed October 15, 1895, based upon six distinct but contiguous placer mining locations, of twenty acres each, made prior thereto, and known, respectively, as the Clark, Heitkemper, Clarno, Liebe, Haight, and Strode, mining claims.

On January 2, 1896, the mineral claimant presented its proof of publication, etc., and tendered payment for the land. The local officers declined to receive the money, owing to the conflicts with the railroad company and the State, and thereupon transmitted the record to your office, with request for instructions as to the proper course to pursue. Under date of January 17, 1896, your office replied, stating "that the lands containing a deposit of marble, which can be mined at a profit, are subject to disposition under the mining laws," but that the mineral claimant's application should have been treated as in the nature of a contest against the railroad company's selection; that the State should have been notified, and ruled to show cause, etc.; that before the applicant could be allowed to purchase under the mining laws, it would have to proceed as thus indicated; and the local officers were instructed to require proceedings to be had accordingly.

The State was thereupon notified, and in reply, filed its protest, admitting the existence of marble in the land, but contending that

marble is not such a mineral as serves to except lands containing it from the grant to the State for school purposes.

As a further result of the instructions from your office, a hearing was had, at which all the parties appeared. After the examination of two witnesses, and the introduction of certain specimens of marble from the claims, as exhibits in the case, the parties, without proceeding further with the testimony, entered into a written stipulation whereby, "for the purpose of saving further cost and time in taking evidence," it was agreed

that the land in controversy is not agricultural or grazing land, and is valuable only for the marble it contains; and this controversy shall be submitted upon the legal question of whether or not marble is a mineral such as to except the land from the grant to the Northern Pacific Railroad Company by virtue of its indemnity selection.

It was also agreed in the same writing, that the testimony, as taken, should be considered only upon the question as to the value of the land on account of the marble it contains, and as to whether marble is a mineral within the meaning of the grant to the railroad company; and it was further stated that this stipulation and agreement should apply to the State of Washington, and that its protest should be merged with that of the railroad company, and be heard as one case on appeal.

The local officers held the land in question to be mineral in character, and that by reason thereof, the portions situated in sections 15 and 21, were excepted from the grant to the railroad company, and the portion situated in section 16, was excepted from the grant to the State.

Both the railroad company and the State appealed.

On August 13, 1896, your office, after observing that under the previous rulings and decisions of the Land Department, public lands chiefly valuable for the deposits of marble therein, had been held subject to entry under the mining laws, but that the question here involved was whether or not such lands passed to the railroad company and the State under their respective grants, held, (1) that the portions of the land in question embraced in sections 15 and 21, were not excepted from the railroad company's grant, (2) that the portion thereof embraced in section 16, was not excepted from the grant to the State, and (3) that the application of the mineral claimant should, therefore, be canceled.

The mineral claimant has appealed to the Department. Several errors are assigned, but they need not be here set out in detail. It is sufficient to say that, in substance, they attack and put squarely in issue the correctness of the several holdings of your said office decision.

The importance of the questions involved is conceded by all parties, and in view thereof, upon request of the mineral claimant, concurred in by the railroad company, and not objected to by the State, the case has been advanced from its regular order and made special.

All questions of fact are settled by the stipulation, and by the evidence introduced before it was entered into. The stipulation shows the land to be non-agricultural, and valuable only for the marble it contains. The evidence shows that the marble is of a superior quality,

susceptible of a high polish, and useful for ornamental purposes. The deposit is represented as very extensive.

The case has been elaborately and ably argued by counsel for the contending parties, both orally and by printed briefs. In view of the magnitude of the interests at stake, and the importance of the questions involved, it has been given the most careful and painstaking consideration.

Briefly stated, the issue presented is, whether lands chiefly valuable on account of the deposits of marble they contain, are embraced by the terms "mineral lands," and "lands valuable for minerals," as those terms are used, respectively, in the aforesaid granting acts, and in the mining statutes of the United States. If such lands are so embraced, then your office decision is wrong, and should be reversed; if not, that decision is right and should be affirmed.

The grant to the Northern Pacific Railroad Company, is of "every alternate section of public land, not mineral," within certain prescribed limits, and with stated provision for indemnity for losses in place limits.

The grant contains several provisos, among which, as pertinent to the issue here involved, are the following:

Provided further: That all mineral lands be, and the same are hereby, excluded from the operations of this act, and in lieu thereof a like quantity of unoccupied and unappropriated agricultural lands, in odd-numbered sections, nearest the line of said road, may be selected as above provided:

And provided further: That the word "mineral," when it occurs in this act, shall not be held to include iron or coal.

The grant to the State, for school purposes, is of "Sections numbered sixteen and thirty-six in every township," with the express provision "that all mineral lands shall be exempted" therefrom. Ample provision for indemnity is made, in the grant to the State, for losses on account of mineral lands.

The mining statutes, as originally enacted, are found in the several acts of July 4, 1866 (14 Stat., 85-6), July 26, 1866 (Id., 251-2), July 9, 1870 (16 Stat., 217), May 10, 1872 (17 Stat., 91-2), February 18, 1873 (17 Stat., 465), and March 3, 1873 (Id., 607). The various provisions of these several acts, as at present codified, are embodied, under the head of "Mineral Lands and Mining Resources," in the Revised Statutes, sections 2318 to 2352, inclusive, except section 2346, which need not be herein referred to. The particular provisions important to here note, are as follows:

Section 2318 provides that—

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Section 2319 provides that—

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Sections 2320 to 2324, inclusive, prescribe certain rules and regulations to govern the location of—

Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits.

Sections 2325 to 2328, inclusive, provide the manner of obtaining title from the government for lands "claimed and located for valuable deposits" under the preceding sections.

By section 2329 it is provided that—

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.

The succeeding sections contain nothing which is necessary to be noted in this discussion.

Briefly summarized, the contention of the railroad company is, that the term "mineral lands," as used in its grant of 1864, and in other railroad land grants, as well as the terms, "lands valuable for minerals," and "valuable mineral deposits," as used in the mining laws, were intended to include only minerals of the metallic class; that the term "mineral lands" as used in its said grant should be construed as excluding therefrom only lands containing valuable metalliferous deposits; and that as marble is not such a deposit, lands containing it, though chiefly valuable on account thereof, are not excepted from its grant. The State takes a similar position with reference to its grant.

This position is squarely attacked by the mineral claimant. Its contention is that the *value*, and not the *kind* of any given mineral deposit, is the controlling key, which is to determine the question whether the lands containing such deposit are included within the meaning of the terms, "lands valuable for minerals," "valuable mineral deposits," and "minerals lands," as used, as aforesaid.

The railroad company's contention is predicated upon the theory that the ordinary and accepted meaning of the term "mineral", as used in America, and particularly in land legislation, prior to and at the date of its grant of July 2, 1864, did not include any mineral deposits except those of the metallic class, and that therefore Congress in making its grant did not intend, by the use therein of the term "mineral lands", to exclude therefrom any lands except those containing metallic minerals; that there is nothing in the mining statutes to indicate that Congress used the terms, "lands valuable for minerals" and "valuable mineral deposits", as therein stated, in any larger or more comprehensive sense than is indicated by the use of the term "mineral lands" in its said grant; that section 2329, which provides for the entry and patent of "claims usually called placers, including all forms of deposit, excepting veins of quartz, or other rock in place," was intended to include only such claims as contain auriferous deposits; and that it

was not the purpose of any subsequent legislation to in anywise enlarge the meaning of the term "mineral lands" as used in its grant.

By the pre-emption act of September 4, 1841 (5 Stat., 453-6), provisions were made for the entry and purchase of the vacant public lands, but it was further provided that no lands on which were situated "known salines or mines", should be subject to entry or sale thereunder. It is contended that "what Congress meant in this act by the term 'mines' must be gathered from the preceding uniform policy as set forth in the legislation" on the subject of mineral in the public lands; and it is claimed that such policy is distinctly indicated by the preceding legislation which reserved to the United States, "lead mines and salt springs, absolutely, and a one-third part of all gold, silver, lead, and copper mines," or, excepting salt springs, minerals of the metallic class only. This preceding legislation is referred to as being embodied in a certain ordinance of the Congress sitting under the Articles of Confederation, passed May 20, 1785, and in certain acts of the Congress under the Constitution, passed at various times, down to and including the year 1816.

It is to be observed, however, that in the act of July 1, 1864 (13 Stat., 343), providing for the disposal of coal lands in the public domain, Congress gave, on this point, its own definition of the term "mines" as used in the former pre-emption act, by declaring that—

Any tracts embracing coal-beds or coal-fields, constituting portions of the public domain, and which, as "mines" are excluded from the pre-emption act of eighteen hundred and forty-one,

might be sold under the terms therein prescribed.

Coal is a non-metallic mineral, and we have here an express declaration of Congress that the same is included within the meaning of the stated exception from said pre-emption act.

In the case of *Mullan v. United States* (118 U. S., 271) the question was, whether coal lands are mineral lands within the meaning of the statutes regulating the disposition of the public domain. The court, after referring to the pre-emption act of 1841, and the coal act of July 1, 1864, said, of the provision herein above quoted from the latter act:

This is clearly a legislative declaration that "known" coal lands were mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention of Congress was clearly manifested.

Here we have both a legislative declaration, and the highest judicial determination, that the term "mineral lands" in the public land laws does include minerals other than those of the metallic class.

It was held by Attorney General Williams, in an opinion under date of August 31, 1872, given at the request of the Secretary of the Interior, that diamonds are embraced by the term "valuable mineral deposits", as used in the act of May 10, 1872. He refers also to the act of July 26, 1866, and expresses the opinion that "these acts ought to be most liberally construed, so as to facilitate the sale" of the mineral lands of the

public domain (14 Op. A. G., 115). These views were concurred in and adopted as the guide for official action in like cases, by Acting Secretary Smith, in a communication addressed to Commissioner Drummond of the General Land Office, dated September 3, 1872 (Copp's Mineral Lands, 119).

In a general circular issued under the mining laws, dated July 15, 1873, Commissioner Drummond, speaking upon the subject of what constitutes "a valuable mineral deposit," said:

That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

It was further stated:

The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, "to promote the development of the mining resources of the United States," and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of particularly specified mineral-bearing lands.

In answer to inquiries, the consideration of which gave rise to the circular, it was further said:

I therefore reply that lands valuable on account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining act of May 10, 1872 (Copp's Mineral Lands, 61-2).

It is proper to observe in this connection, that prior to the issuance of this circular, a special statute had been enacted regulating the disposal of coal lands (Act of July 1, 1864, *supra*), and that the uniform policy of the government had been to reserve salt lands and salt springs from sale, absolutely. (See *Morton v. Nebraska*, 21 Wall., 660, and the various acts of Congress therein referred to; *Hall v. Litchfield*, Copp's Mineral Lands, 321; *Salt Bluff Placer*, 7 L. D., 549.) These things were doubtless in the mind of the Commissioner at the time, and they furnish an explanation of the exceptions noted in said circular.

Following this circular, Commissioner Drummond, on July 20, 1873, held that lands more valuable on account of deposits of iron ore, than for agricultural purposes, were subject to disposal under the provisions of the mining laws. (Copp's Mining Decisions, 214.)

On January 30, 1875, it was held by Commissioner Burdett, that lands containing valuable deposits of umber, or of petroleum, were subject to entry under the mining laws. (*Sickles' Mining Laws*, 491). And on June 28th following, it was held by the same Commissioner, that lands more valuable for deposits of limestone, or marble, than for purposes of agriculture, and lands containing valuable deposits of kaolin,

are subject to disposal under the mining acts. (Copp's Mining Lands, 194.)

It was also held by Commissioner McFarland, on March 31, 1882, that lands containing deposits of petroleum "are subject to entry and disposal according to the law and regulations relating to placer claims" (9 C. L. O., 51). And by the same Commissioner, in the case of *Montagne v. Dobbs* (9 C. L. O., 165, 1882), it was further held that veins of clay and other non-metalliferous mineral substances are subject to location as placers; also building stone, in the case of *H. P. Bennett Jr.* (1884, 3 L. D., 116).

The case of *W. H. Hooper* (1 L. D., 560, 1881) involved the question whether gypsum is a mineral within the meaning of the mining laws. In disposing of the case Secretary Kirkwood referred to and concurred in the views expressed in the circular of July 15, 1873, namely:

That whatever is recognized as a mineral by the standard authorities on the subject, when the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated as coming within the purview of the mining act of 1872.

No proof having been introduced to show the comparative value of the particular tract involved, for mineral or agricultural purposes, an investigation, in that respect, was ordered, with the direction that if the land should be found to have greater value for the former, patent should issue to the mineral claimant.

In a communication by Secretary Teller to Commissioner McFarland, under date of January 30, 1883, it was directed that "public lands containing valuable deposits of borax, the carbonate and nitrate of soda, sulphur, alum, and asphalt," when shown to be valuable only on account of such deposits, should be enterable under the mining laws (1 L. D., 561).

Following this, on April 16, 1883, in the case of *Maxwell v. Brierly* (10 C. L. O., 50), Secretary Teller, after referring with approval to the circular of July 15, 1873, held that lands containing deposits of "gypsum and limestone . . . asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, petroleum, slate, and other substances," are subject to the operation of the mining laws, when shown to be more valuable on account of such deposits than for agricultural purposes. (See also 1 Brainard's Legal Prec., 98). And in the case of *The Dobbs Placer Mine* (1 L. D., 565-9, 1883), the same Secretary held that "fire-clay or kaolin, in the manner in which it exists as a deposit, is properly the subject of a placer location."

Such are some of the rulings and decisions of the Land Department, made shortly after the mineral land laws became a part of the public land system, and by the officers of the government charged with their administration; and as contemporaneous and uniform interpretation, they are entitled to great weight.

These and other rulings on the subject, with few exceptions, have been consistently and uniformly to the effect that the mining laws

embrace not only lands containing metallic minerals, but all valuable mineral deposits of whatever kind or nature—whether metalliferous or fossiliferous—wherever the lands containing them are shown to be more valuable on account thereof, than for agricultural purposes. The value of the mineral deposit, rather than its kind, appears to have been the controlling factor in determining whether the lands containing it were subject to entry and patent under the mining laws.

In this connection, it is permissible to refer to some legislation on the subject, since the act of May 10, 1872.

By act of February 18, 1873 (17 Stat., 465), "deposits or mines of iron and coal," in the States of Michigan, Wisconsin and Minnesota, were expressly excluded from the operation of the act of May 10, 1872, and lands containing such deposits were declared subject to sale and purchase according to legal subdivisions, as before the passage of the act of 1872. The act of 1873 would have been wholly unnecessary to accomplish the exclusion stated as to coal, if it were true that the act of 1872 was not intended to embrace any minerals except those of the metallic class.

By the act of May 5, 1876 (19 Stat., 52), it was declared that "deposits of coal, iron, lead, or other mineral," within the States of Missouri and Kansas, should be excluded from the operation of the act of May 10, 1872, and all lands in said States were made subject to disposal as agricultural lands. Here non-metallic minerals are also referred to, and what has been said of the act of February 18, 1873, applies equally to this.

The act of June 3, 1878 (20 Stat., 89), provided for the sale of lands chiefly valuable for timber or stone, in certain States and Territories, but declared that nothing therein contained should "authorize the sale of any mining claim . . . or lands containing gold, silver, cinnabar, copper, or coal." Both classes of minerals are again specifically mentioned, the metalliferous and non-metalliferous being associated together and placed upon an equality.

By the act of March 3, 1883 (22 Stat., 487), it was declared:

That within the State of Alabama, all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided however*, That all lands which have heretofore been reported to the General Land Office as containing coal and iron, shall first be offered at public sale.

Here the mention of coal, a non-metalliferous mineral, is again closely associated with iron, a metalliferous mineral, and both are named in connection with mineral lands.

The following are some of the more important recent decisions of this Department on the subject.

Conlin v. Kelly (12 L. D., 1—1891). In this case it was held that stone useful only for general building purposes is not subject to appropriation under the mining laws. It was further stated, however, that—

The stone in the tract in controversy has no peculiar property or characteristic that gives it especial value, such as attaches to gypsum, limestone, mica, marble, slate, asphaltum, borax, auriferous cement, fire-clay, kaolin or petroleum.

McGlenn v. Wienbroeer (15 L. D., 370—1892). Here the decision was that lands containing a valuable deposit of stone, useful for special purposes, may be entered as a placer claim; and the case of Conlin v. Kelly was distinguished.

Van Doren v. Plested (16 L. D., 508—1893). In this case it was held (syllabus) that—

Land containing a deposit of sandstone of a superior quality for building and ornamental purposes, and valuable only as a stone quarry, may be entered as a placer claim under the general mining laws.

Hayden v. Jamison (Id., 537) and Clark v. Erwin (Id., 122) were cases similar to that of Conlin v. Kelly, *supra*.

In Shepherd v. Bird (17 L. D., 82—1893) it was held that lands containing stone suitable for making lime, might properly be entered as a placer claim, or purchased under the timber and stone act of June 3, 1878.

In Gary v. Todd (18 L. D., 58—1894) it was held that lands chiefly valuable for phosphate deposits were mineral lands and not subject to entry under the homestead laws.

These decisions, as a rule, do not vary materially, if at all, from the earlier rulings and decisions of the Land Department on the subject. On the contrary, they show a practically uniform adherence to the rule originally announced in the circular of July 15, 1873, hereinbefore referred to. They are generally to the effect that lands *chiefly valuable* for mineral deposits, of whatever kind or nature, may be properly disposed of under the mining laws.

In the case of Freezer v. Sweeney (21 Pac. Rep., 20) the supreme court of Montana (1889), referring to certain adjudications of the Land Department on the subject, held that a stone quarry may be located and patented as a placer claim. In its opinion the court refers to section 2329 of the Revised Statutes, and says:

This section extends and enlarges the signification commonly given to "placer claims," and makes such locations include all forms of deposit, excepting quartz veins or other rock in place. The officers of the Land Department have construed it as embracing quarries of rock valuable for building purposes, as already stated, and we do not doubt the correctness of this construction.

The contrary view was taken, however, by the supreme court of the State of Washington, at a later date, in the case of Wheeler v. Smith (32 Pac. Rep., 784). These are the only cases cited from the courts which discuss or attempt to determine whether non-metallic minerals are minerals within the meaning of that word as employed in the statutes relating to the disposition of the public lands.

The interpretation thus shown to have been adopted at an early date by the Land Department, and followed with practical uniformity for over twenty years, is attacked as being obnoxious to well established rules of construction. It is insisted that the particular and specific words, "gold, silver, cinnabar, lead, tin, copper," as used in section 2320

of the Revised Statutes, must be considered as furnishing a guide to, and placing a limitation upon the meaning to be given the general words which immediately follow, and that in view thereof the general words must be held to include only deposits of the same kind or nature as those designated by the preceding particular words—that is, mineral deposits of the kind or nature *ejusdem generis* with gold, silver, cinnabar, lead, tin, or copper—or, in other words, metalliferous ore. The same position is taken with reference to section 2329. The specific word there is, “placers.” That word, it is said, should be restricted to its technical meaning—places where gold is found—and further, that the general words—“including all forms of deposit”—which follow, must be held, under the rule, to include only the different forms of placer gold deposits.

The Department is not unaware of the well settled rule of statutory construction upon which this contention is sought to be based, namely: That general words which follow particular and specific words of the same kind or nature, take their meaning from the particular and specific words, and are generally presumed to be restricted to the same genus as those words, and as comprehending only things of the same kind as those designated by them; but it must be remembered that this rule has its proper application only in cases where there is nothing in the statute tending to show that a wider and more comprehensive meaning was intended by the use of the general words. If, therefore, said sections 2320 and 2329, only, were to be construed, and that, independently of anything outside of them, as though standing by themselves; or, if the act as a whole contained nothing of a nature purporting to show that the general words used in said sections were intended in a larger sense than the specific words indicate; then the present case might be considered such an one as to justify the application of the rule.

The sections named, however, are not to be construed by themselves. The whole act is to be looked to, and its general purpose ascertained, in order to properly determine the meaning of its several provisions, and the different sections are to be construed as parts of one general statute. Thus looking at the act, we find its general purpose stated in section 2319 (Sec. 1, Act of 1872) in the broad declaration that—

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States, etc.

It is important to observe that there is no limitation or restriction as to the kind or class of mineral deposits which are thus made subject to exploration and purchase. The invitation is to explore and purchase “all valuable mineral deposits” in the public lands, and to occupy and purchase the lands in which they may be found. Broader, or more comprehensive language could hardly have been used. Wherever mineral deposits are found in the public lands, they are declared to be free

and open to exploration and purchase, with only one qualification—they must be *valuable* mineral deposits.

Then follow certain provisions for the acquisition of title from the government to mining claims, once discovered and properly located, whether they be “upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits,” (Sec. 2320), or whether they be “claims usually called ‘placers’, including all forms of deposit, excepting veins of quartz, or other rock in place,” (Sec. 2329).

Now, coming again to the general words “or other valuable deposits,” as used in section 2329, with reference to vein or lode claims, and the words “including all forms of deposit,” as used in section 2329, with reference to claims usually called “placers”, and construing them in the light of the declared general purpose of the act, as a whole, as specifically indicated in sections 2318 and 2319, the conclusion seems irresistible that the general words in question, as used in both instances, depend for their meaning, not only upon the specific words which they follow, but depend also upon and draw from the larger and more comprehensive expressions—“all valuable mineral deposits,” as used in section 2319, and “lands valuable for minerals”, as used in section 2318. Looking, then, to both the sources stated for the guide to the meaning of the general words, the further conclusion seems equally irresistible that in the first instance (Sec. 2320) they were intended to include other valuable mineral deposits, of whatever kind, if in the form of *veins* or *lodes* of *quartz*, or other *rock in place*, while in the second (Sec. 2329), they were intended to include all forms of mineral deposit, of whatever kind or nature—whether metallic or otherwise—excepting *veins* of *quartz* or other *rock in place*.

Such seems to be a fair and reasonable construction of the sections in question, and in my judgment, is the only one that accords with the manifest purpose of the act as a whole, which was, as we have seen, the adoption of a general scheme or system for the development of the mineral resources of the country. The larger and more comprehensive provisions of both sections 2318 and 2319, must be given reasonable effect and operation—they cannot be ignored—and the Department is not aware of any rule of construction requiring that the specific designations used in the succeeding sections, shall operate to restrict or limit the meaning and effect of such larger provisions. Furthermore, if the rule of *ejusdem generis* were held to apply, and the construction contended for adopted, the result would be equivalent to saying that Congress, after having declared that “all valuable mineral deposits” in the public lands, without reservation or restriction as to kind or nature, shall be free and open to exploration and *purchase*, has provided a means for the *purchase* only of a certain class (the metallic) of such valuable mineral deposits. Such a construction would reduce the

statute to an absurdity. This would furnish a sufficient reason for its rejection if there were no other.

Ever since the enactment of the mining laws, however, as has been shown, the construction by the Land Department, with practical uniformity, has been the other way. The more liberal view was early adopted and has since prevailed to the extent that many titles to lands patented as mineral, though of the non-metallic class, are now depending upon it. This view having been generally accepted for so long a time, and property rights having grown up under it, there should be, in my judgment, the clearest evidence of error, as well as very strong reasons of policy and justice controlling, before there should be a departure from it.

In the case of *United States v. Moore* (95 U. S., 760-3) the supreme court said:

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

And in the more recent case of *Brown v. United States* (113 U. S., 568-71) it was held by the same court, citing *Edwards v. Darby* (12 Wheat., 206), that—

in the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.

These authorities are especially appropriate here, and in my judgment should be regarded as of controlling weight in support of the construction which has heretofore prevailed.

It may be well to note in this connection, that soon after the decision in the case of *Conlin v. Kelley*, *supra*, wherein lands containing stone, useful only for building purposes, were held not subject to the operation of the mining laws, Congress, by act of August 4, 1892 (27 Stat. 348), especially declared that lands "chiefly valuable for building stone," should be enterable "under the provisions of the law in relation to placer mineral claims." It would thus seem that Congress regarded even the ruling in that case as a departure from the liberal construction theretofore adopted by the Land Department, to such an extent as to demand legislative action disapproving the result thereof.

Sufficient has been said to show what has been the long-continued practice of the Land Department, and to point out the danger and harmful results of a departure from that practice at this late day. Independently of these things, however, it may be added that the construction, as an original proposition, appears to be clearly right. The Department, therefore, in concluding this branch of the case, adheres to the rule:

That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same

is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

The lands here involved being admittedly of great value for the deposits of marble they contain, and valuable only on account thereof, are clearly within the meaning of the rule thus laid down, and must therefore be held subject to entry under the mining laws, unless it be held that mineral lands of such character are not within the exceptions from the railroad and State grants in question.

This brings us to the other phase of the contention: That the determination or classification of lands as mineral within the meaning of the mining laws, does not furnish a guide for the classification of lands as mineral within the meaning of the excepting clause of the grant of July 2, 1864; in view whereof it is insisted that though lands chiefly valuable for minerals of the class other than metallic may be subject to entry in some instances under the mining laws, yet no lands but those containing the metalliferous minerals can be held to come within the meaning of the exception from said grant.

At the very threshold of the discussion of this branch of the case, we are met by the aforesaid act of July 1, 1864, passed the day before the grant to the railroad company was made, wherein it was declared that coal—a non-metallic mineral—is within the exception of mineral lands in the pre-emption act of 1841, and with the case of *Mullan v. United States*, *supra*, holding that this was a legislative declaration to the effect that coal lands are mineral lands within the meaning of that term as used in statutes regulating the public lands, unless a contrary intention is clearly manifest. This legislative interpretation of the word “mines,” used in the pre-emption act, as including non-metallic minerals, given the day before the grant to the railroad company was made, is very significant, and would seem to negative all idea that Congress intended by the use, the next day, of the term “mineral lands,” in said grant, to include thereby only lands containing the metalliferous minerals. The larger and more comprehensive meaning would seem clearly to have been intended, in the absence of anything plainly manifesting a contrary purpose.

Again, the proviso in the excepting clause of the company's grant, that the word “mineral” when used in the act shall not be held to include coal and iron, clearly shows the mind of Congress on the subject. If the purpose had been to except from the grant only lands valuable for metalliferous minerals, there would have been no necessity for said proviso as to coal; and if the exception of mineral land would have included coal, as must be admitted, there is no apparent reason why the exception may not include any other fossiliferous mineral substance, if the lands containing it are chiefly valuable on that account. The contention that this would make the exception co-extensive with

the grant, is fully answered by the condition that in all cases the lands must be *valuable* for their minerals, which, under a long line of decisions, has been held to mean: chiefly valuable for minerals, or, which is the same thing, more valuable on that account than for agricultural purposes. There is nothing in the act making the grant to this company, nor in any contemporary legislation on the subject of which the Department is aware, that clearly manifests an intention on the part of Congress to restrict or limit the meaning of the term "mineral lands" as used in said grant to metalliferous minerals only. The same may be said of the grant to the State.

In the act of February 26, 1895, (28 Stat. 684) which provided for the examination and classification, in the States of Montana and Idaho, of mineral lands within the limits of the company's grant but excepted therefrom on account of their mineral character, it was declared (Section 3):

That all lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws.

The act also contains the proviso that the word "mineral" shall not be held to include coal and iron, the same as in the original grant. Here we have what appears to be a subsequent legislative interpretation of the meaning of the exception of "mineral lands" from the company's grant. It is, in effect, that all lands which by reason of valuable mineral deposits are open to exploration, occupation, and purchase, under the provisions of the mining laws, shall be classified as "mineral lands" within the meaning of said exception—not including, of course, coal and iron. In view of this interpretation, it seems plain that in the mind of Congress the term "mineral lands," as used in said grant, is the equivalent of the terms "lands valuable for minerals," and "all valuable mineral deposits," as used in the mining statutes. This interpretation is in entire harmony with the contemporaneous and long continued construction by the Land Department.

The case of *Tucker v. Florida Railway and Navigation Company* (19 L. D., 414) is cited and relied on as holding the contrary view. In that case the Department, after referring to the exception of mineral lands from the grants made during the year 1864, and subsequently thereto, and the provision that the word "mineral" as therein used should not include coal and iron, further said:

It would seem, therefore, that the word "mineral" is given a limited construction, and when this fact is taken into consideration with what has been before stated on the subject of mineral legislation, it would seem that the purpose of the word "mineral" as used in the act of June 22, 1874, *supra*, was to except from selection, on account of said act, those lands containing valuable metals, such as gold, silver, cinnabar, and copper. The word was not used in its broader sense, for the greater part of the earth contains mineral in some form, the value of which often depends upon its location, or the state of advancement of science which makes known its uses.

The selections authorized by the act of June 22, 1874, were of "lands not mineral"—practically the same exception as that contained in the Northern Pacific grant. The theory upon which the decision seems to be based is, in part at least, that the express exclusion of coal and iron from the mineral exception in the grants of 1864, and subsequent grants, is an indication that the word mineral was used by Congress in a restricted or limited, and not in its broader sense. It does not appear to me that this theory can be sustained. Indeed, it would seem that exactly the opposite view is supported by sound reasoning. The very fact that the express exclusion of coal—a non-metallic mineral—from the exception of mineral lands, was necessary in order to exclude it, shows that the word mineral was not used in its limited sense, and that it was used in that broader sense which includes all mineral deposits of whatever kind or nature. There does not appear to be any reasonable question of the soundness of this view, and it is in exact accord with the legislative interpretation shown by the act of February 26, 1895, which was passed after the decision in the Tucker case.

The further argument that the word was not used in its broader sense for the reason that the greater part of the earth contains mineral in some form, has been already answered in the statement that under the law, in all cases, the land must not only contain mineral but must be chiefly valuable on account of its mineral.

In view of what has been said on this point, the Department is of the opinion and decides:

That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, where they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

As the lands here in question come clearly within the rule thus announced, those portions thereof situated in sections 15 and 21, must be held as excepted from the grant to the Northern Pacific Railroad Company, and its application to select the same will be rejected. That portion in section 16, must be held as excepted from the grant to the State. Upon proper showing of compliance with the mining laws, the lands may be patented to the mineral claimant. Your office decision is therefore reversed.

The case of *Tucker v. Florida Railway and Navigation Company*, and all other cases in conflict with the views herein expressed, are hereby overruled.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

OREGON AND CALIFORNIA R. R. CO.

A decision of the General Land Office to the effect that upon relinquishing certain lands a railroad company will be entitled to select others under the act of June 22, 1874, does not prevent departmental consideration as to the right of the company to those relinquished, when the question of the company's right under the selection comes before the Department for its action.

Secretary Bliss to the Commissioner of the General Land Office, September 9, 1897. (W. V. D.) (F. W. C.)

The Oregon and California Railroad Company has appealed from your office decision of January 17, 1896, holding for cancellation certain selections made by said company April 15, 1889, under the act of June 22, 1874 (18 Stat., 194), in lieu of the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 17 S., R. 1 W., Oregon City land district, Oregon.

The tract made the basis for the company's selection was entered under the homestead law July 17, 1865, which entry remained of record until canceled, March 26, 1870. The grant under which the company claims was made by the act of July 25, 1866 (14 Stat., 239); so that at the date of the passage of said act the tract relinquished by the company was appropriated under the entry of record, and for that reason excepted from the said grant. It is urged by the company, however, that as its relinquishment was made upon the request of your office, in 1870, its right to make a new selection under the act of 1874 attached, and no change of rule, affecting the question as to the company's right to the land relinquished, could affect its right to make such lieu selection.

At the time the company relinquished, it was held by this Department that all lands free from claim at the date of definite location, without regard to their condition at the date of the passage of the act making the grant, passed thereunder.

In the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535) it was held, that lands which at the date of the passage of the act making the grant to said company, were segregated from the public lands within the limits of the grant, by reason of a prior pre-emption claim to it, did not, by the cancellation of the pre-emption right before the location of the grant, pass to the company, but remained part of the public lands of the United States.

It is clear, therefore, that this tract did not pass to the company under its grant, and that its relinquishment, made, as alleged, at the instance and request of your office, was unnecessary. It has been repeatedly ruled by this Department that a decision of your office to the effect that upon relinquishing certain lands a company would be entitled to select others under the act of June 22, 1874, does not prevent departmental consideration as to the right of the company to those

relinquished, when the question of the company's right under a selection made comes before this Department for approval; and if it is then found that the company had no title to the land relinquished, the selection must be rejected. See case of Southern Pacific R. R. Co. (22 L. D., 185) and cases therein cited.

The action of your office, holding for cancellation the said selection by the company, is accordingly affirmed.

TOWNSITE CLAIM—TERRITORIAL LEGISLATION.

CITY OF CHAMBERLAIN *v.* KING ET AL. (ON REVIEW.)

The right of townsite claimants, acting under territorial legislation, to include certain lands within their corporate limits for municipal purposes, cannot be recognized, if said lands were in fact at such time not subject to such appropriation.

Secretary Bliss to the Commissioner of the General Land Office, September 9, 1897. (W. V. D.) (C. J. W.)

On April 15, 1896, Henry J. King made application to make homestead entry for lots 3 and 4 and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 10, and lots 1 and 9 of Sec. 15, T. 104 N., R. 71 W., Chamberlain land district, South Dakota. On the same day J. W. Orcutt, as mayor of Chamberlain, made application to make townsite entry for the same land, without disclosing whether said entry was sought as an original or additional townsite entry, and on the same day Eliza Reynolds applied to make homestead entry for lots 1 and 9 of section 15.

The fees were tendered by each of the applicants and rejected, but their respective applications were accepted in the order presented, and a hearing was ordered to allow them to present proof of their claims. Said hearing closed July 19, 1895, and on September 24, 1895, the local officers rendered a decision rejecting the application of Orcutt, mayor, and accepting the application of Eliza Reynolds and the application of Henry King, except as to lots 1 and 9 of Sec. 15, to which they held Eliza Reynolds was entitled.

Appeal was made to your office, and on March 24, 1896, the decision of the local officers was affirmed, with the modification that the right of Eliza Reynolds to make entry was limited to lot 9, and the application of Orcutt was rejected.

A motion for review of your office decision was made by the mayor, which was overruled and the original decision adhered to.

The townsite claimants appealed to the Department. On the appeal counsel was heard both orally and by brief, and, on June 15, 1897, your office decision was affirmed here. (24 L. D., 526.)

The mayor of the City of Chamberlain has filed a motion for review of the last-named decision, in which it is alleged various errors were

committed. The motion purports to state eighteen grounds of error, but upon examination they are not found to contain any material proposition touching which counsel was not heard before the decision was rendered, and which was not considered in rendering it. It is alleged that an important fact was overlooked and not commented on—which is, that on January 18, 1890, the people of Chamberlain by vote organized, and were incorporated under the general laws of South Dakota.

The record has been re-examined, and this fact now insisted upon as important considered again. It is not apparent that it in any manner helps the townsite claimants.

It is claimed now that the people, in the exercise of a power conferred by an act of the territorial legislature, which simply authorized them to organize town or city government in the manner prescribed by the act, include the land in question in the limits which they selected, and that the map filed shows the land involved to be within the incorporated limits of Chamberlain. The people thus acting had no more power than the territorial legislature had, and could no more subject this reserved land to municipal use than the legislature could.

After very full consideration, it was decided that the legislature had no such power. The fact that the people of Chamberlain have organized a city government under the general laws does not affect the conclusions heretofore reached. The fact that a survey was made in 1890, and a map filed, which showed this reserved land to be within the claimed limits was not overlooked, but it was not considered that it affected the merits of the question, since the status of the land as to being reserved was the same when the map was filed that it was when the act of March 7, 1885, was passed, and it was not then occupied or used for town site purposes.

No sufficient reason is found for changing the conclusions heretofore reached on the merits of the case, and the motion for review is denied.

RIGHT OF WAY—STATION GROUNDS—MINERAL APPLICATION.

MONTANA CENTRAL R. R. Co.

A plat of station grounds covering land embraced within a prior mineral application can not be approved; but the use and occupancy of such land for station purposes will protect the right of the company, as against subsequent claimants, if the mineral application is abandoned.

Secretary Bliss to the Commissioner of the General Land Office, September 9, 1897. (W. V. D.) (F. W. C.)

The Montana Central Railroad Company has appealed from the action taken in your office letter "F" of May 29, 1896, holding that the tract covered by its station plat submitted for approval under the provisions of the act of March 3, 1875 (18 Stat., 482), covering a portion of the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 9, township 8 N., range 3 W., Helena land

district, Montana, is not public land, and therefore that the plat of the station grounds is not subject to approval under said act.

The statement contained in your office letter is that the tract applied for by the company is embraced in the mineral application, No. 179, filed by Charles W. Cannon, *et al.* April 16, 1873.

In its appeal the company admitted the existence of said mineral application, but set out that it had, under the laws of Montana, proceeded to condemn said tract to its use for station purposes in a suit against said locators, and that the damages assessed against the said company had been paid into court.

The right of way granted by the act of 1875, *supra*, is limited to public lands; and where there are no public lands embraced within the application for right of way it has been uniformly held by this Department that an approval will not be granted.

While it appears that the company, as against the claim under said mineral application, is fully protected under the proceedings already had in the local court, its purpose in desiring the approval of its application for right of way under the act of March 3, 1875, is stated to be for the purpose of protecting it against any subsequent claimant for the land, in the event that the mineral applicants should abandon their claim.

A mineral application, while of record, is an appropriation of the tract covered thereby; and in the decision of the supreme court in the case of *The Northern Pacific Railway Company v. Sanders* (166 U. S., 621) was held to be a sufficient claim to except the lands covered thereby from the operation of the grant to said company.

It might be here stated, in view of the fact that the company in its appeal states that it has been advised that Cannon and his associates have abandoned the land in controversy, that on April 22, 1897, the receiver at Helena reported that the mineral applicants had instituted proceedings in the local office to perfect their application, No. 179, to mineral entry, and among the papers filed is their consent to the grant of the right of way to the Montana Central Railway Co.

Upon the facts disclosed by the record, I can find no error in the holding of your office, that the tract covered by the company's plat submitted for approval is not public land within the meaning of the act of March 3, 1875, and the plat is therefore not subject to approval under said act.

As the company states in its appeal that it has entered into possession of the lands and erected thereon a water tank, round-house and other buildings necessary to the operation of its railroad, no subsequent claimant, in the event that the mineral applicants fail to perfect their claim to entry, could secure a right that will defeat them in their possession, or that would prevent the approval of its plat, if again submitted upon the cancellation of the mineral application.

See *St. P. M. and M. Ry. Co. v. Maloney et al.*, 24 L. D., 460. *Dakota Central R. R. Co. v. Downey*, 8 L. D., 115.

Your office decision is accordingly affirmed.

FERST *v.* SOLBERG.

Motion for review of departmental decision of April 29, 1897, 24 L. D., 376, denied by Secretary Bliss September 9, 1897.

INDIAN LANDS—APPROVAL OF DEED.

OPINION.

A purchaser from a Shawnee grantor under a deed approved by the Department, without restriction or condition, takes the title clear of all conditions.

Assistant Attorney-General Van Devanter to the Secretary of the Interior.
(W. C. P.)

I am in receipt by reference of Acting Secretary Ryan of a letter from the Commissioner of Indian Affairs, dated August 19, 1897, relative to the approval of deeds from Shawnee Indians, with request for an opinion upon the matter therein presented.

By the treaty of May 10, 1854 (10 Stat., 1054), the Shawnee Indians ceded to the United States all the lands west of the State of Missouri set apart for them under the treaty of November 7, 1825 (7 Stat., 265), and the United States ceded to the Shawnee Indians two hundred thousand acres of land in Kansas out of which each was to select, if a single person, two hundred acres, and if the head of a family a quantity equal to two hundred acres for each member of the family. As to patents for said selections, it was provided in said treaty (Art. 9) as follows:

Congress may hereafter provide for the issuing to such of the Shawnees as may make separate selections, patents for the same; with such guards and restrictions as may seem advisable for their protection therein.

Congress provided for the issuing of patents by the act of March 3, 1859, (11 Stat., 425) section 11 of which contains the following:

That in all cases where, by the terms of any Indian treaty in Kansas Territory, said Indians are entitled to separate selections of land, and to a patent therefor, under guards, restrictions, or conditions for their benefit, the Secretary of the Interior is hereby authorized to cause patents therefor to issue to such Indian, or Indians, and their heirs, upon such conditions and limitations, and under such guards or restrictions as may be prescribed by said Secretary.

Patents were afterwards issued to those Indians with a restriction as to sale or conveyance as follows:

but with the stipulation prescribed by the Secretary of the Interior, under the act of Congress aforesaid of March 3, 1859, that the said tracts 'shall never be sold or conveyed by the grantor or . . . heirs, without the consent of the Secretary of the Interior for the time being.'

As early as May 27, 1861, rules and regulations to be observed in the execution of conveyances of land for which patents were issued under said act of March 3, 1859, were adopted and on June 22, 1878, modified

rules relating to conveyances of Shawnee lands were approved. These rules, however, relate to the formalities to be observed in the execution of deeds and contain nothing in reference to the question now presented.

It frequently happens that one of these Indian patentees sells his land to another Shawnee Indian. That sale must receive the approval of this Department to make the conveyance valid. The question now arises as to whether a conveyance by the Indian grantee in such a transaction must also be approved, that is, whether the departmental sanction is necessary so long as the title remains in a Shawnee Indian. The Commissioner of Indian Affairs asks for

the opinion of the Department on the question of second approvals, that shall serve as a future and final guide for this office in its conduct in such matters.

The whole matter as to conditions, limitations, guards and restrictions to be inserted in patents to these Indians was placed in the hands of the Secretary of the Interior and a conclusion was reached as to the necessities in this direction when the form of the patent was determined upon. Notice was then given to the world of the conditions attaching to the Indian title, which was that the land should "never be sold or conveyed by the grantee or (his) heirs without the consent of the Secretary of the interior for the time being." When this condition has been once met by the unconditional consent of the Secretary of the Interior to a conveyance of a certain tract of land the title vests in the grantee of such a conveyance without condition or limitation. The Secretary may couple his consent with such conditions as he may see fit to make where the grantee is a Shawnee Indian and the grantee who accepts the conveyance subject to such conditions would then take the title encumbered therewith.

In my opinion the proper practice in the future would be in those cases where it seems proper to the protection of a Shawnee Indian grantee to insert in the approval of these conveyances such conditions or restrictions as to further conveyances as may be necessary. By this course notice would be given to all that this Department still retains control of the land as to future conveyances.

It seems from statements made by the Commissioner of Indian Affairs that it was at first held that the approval of a conveyance, even though a Shawnee Indian were the grantee, met all the requirements and relieved the title of all conditions, but that in later years a different view was entertained, it being held that so long as the title remained in a Shawnee Indian the restrictions upon alienation remained in force. I am of the opinion however that a purchaser from a Shawnee grantor under a deed approved by this Department without condition or restriction takes the title clear of all conditions.

Approved: September 9, 1897,

C. N. BLISS,

Secretary.

PUBLIC RESERVATION—CAPITOL GROUNDS.

OPINION.

In the absence of express statutory authority the Architect of the Capitol has no right to permit the erection of a terminal railway station on the capitol grounds.

First Assistant Attorney Campbell to the Secretary of the Interior,
September 14, 1897. (W. O. P.)

I am in receipt, by your reference, of a letter from the Architect of the U. S. Capitol, in relation to a proposed structure to be erected in the Capitol grounds as a terminal station for the Metropolitan railroad, with your request

for opinion as to the right of the Architect of the Capitol to permit the erection and maintenance of the building in question, without specific authority from Congress therefor.

The control of public buildings and grounds of the United States rests primarily in Congress, and no officer of the government has any authority over them except such has been delegated to him by Congress by express grant or by implication equivalent thereto. I do not find any law by which any officer has been given authority to permit the use of any portion of the capitol grounds by any person or corporation for any purpose, permanent or temporary. On the other hand, the joint resolution of June 30, 1864 (13 Stat., 412), afterwards incorporated in the Revised Statutes (Sec. 1818), directs the Secretary of the Interior to prevent the erection of any permanent building upon any property reserved to the use of the United States, unless plainly authorized by Congress. Said section reads as follows:

The Secretary of the Interior is directed to prevent the improper appropriation or occupation of any of the public streets, avenues, squares or reservations in the city of Washington, belonging to the United States, and to reclaim the same if unlawfully appropriated; and particularly to prevent the erection of any permanent building upon any property reserved to or for the use of the United States, unless plainly authorized by act of Congress, and to report to Congress at the commencement of each session his proceedings in the premises, together with a full statement of all such property, and how, and by what authority, the same is occupied or claimed. Nothing herein contained shall be construed to interfere with the temporary and proper occupation of any portion of such property, by lawful authority, for the legitimate purposes of the United States.

It is not claimed that the erection of this proposed building is authorized by act of Congress.

It seems that the railroad company requested of the Senate Committee on Public Buildings and Grounds permission to erect this building, and that such permission was formally given. This was not an act of Congress, and hence does not constitute the authority contemplated by the law.

After a careful consideration of this matter, I am of the opinion, and

so advise you, that the Architect of the Capitol has no right to permit the erection of the building in question without specific authority by act of Congress.

Approved:

C. N. BLISS,

Secretary.

RAILROAD GRANT—JUDICIAL CONSTRUCTION.

NORTHERN PACIFIC RY. CO.

Directions given for the suspension from entry and patent of lands falling within the purview of the departmental decision in the case of Spaulding v. Northern Pacific R. R. Co., 21 L. D., 57.

Secretary Bliss to the Commissioner of the General Land Office, September 15, 1897. (F. L. C.) (F. W. C.)

I am in receipt of your office letter of August 30, 1897, enclosing the application made on behalf of the Northern Pacific Railway Company, successor to the Northern Pacific Railroad Company, for the suspension from entry and patent of the lands coming within the purview of the decision in the case of Spaulding v. Northern Pacific Railroad Company (21 L. D., 57).

In said case it was held (syllabus):

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and, so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefor forfeited by the act of September 29, 1890, the lands so released from said grant, do not inure to the later grant, but are subject to disposal under the provisions of said forfeiture act.

The application by the company is based upon an opinion of the United States circuit court for the western district of Washington, in the case of said company v. Balthazer *et al.*, dated August 14, 1897, in which opinion it is stated:

I am constrained, however, by the decisions of the circuit court of appeals for this circuit, in the cases of Oregon and C. R. Company *et al.* v. United States, 77 Fed. Rep. 57-82; and Eastern Oregon Land Company v. Wilcox, 79 Fed. Rep. 719, to hold that as the Northern Pacific Railroad Company never made a definite location of any line of road between Portland and Wallula, the original land grant never took effect as to any land between said places, therefore, the lands in controversy were, for aught that appears to the contrary, at the date of the joint resolution of May 31, 1870, and at the time of the definite location of the railroad from Portland to Tacoma, non-mineral public lands of the United States, not reserved, sold, granted or otherwise appropriated, and by said joint resolution the same were granted to the company upon conditions which have been performed, so that the title of the company, and its vendees, has become vested and perfect.

From a careful consideration of the matter I deem it advisable to grant the request for suspension, and you will issue necessary instructions to the local officers accordingly.

COSBY ET AL. *v.* AVERY ET AL.

Motion for review of departmental decision of June 29, 1897, 24 L. D., 565, denied by Secretary Bliss, September 15, 1897.

CIRCULAR.*

SETTLERS ON NORTHERN PACIFIC INDEMNITY LANDS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., August 5, 1896.

REGISTERS AND RECEIVERS, UNITED STATES LAND OFFICES.

GENTLEMEN: Your attention is called to the provisions of an act of Congress approved June 3, 1896, 29 Stat., 245, entitled "An act for the relief of settlers on the Northern Pacific Railroad indemnity lands," a copy of which is attached. The act contains three sections.

By the first section those persons, their heirs, or legal representatives, who, between August 15, 1887, and January 1, 1889, settled upon and made final proof and entry for land within what is known as the second indemnity belt of the Northern Pacific Railroad grant, within the State of Minnesota, which entries, without their fault, were afterwards canceled, are allowed to make homestead entry of a quantity of unappropriated public lands, subject to homestead entry, equal in acreage to that embraced in the canceled entry, and to receive patent therefor without settlement, improvement or cultivation; and those persons, their heirs, or legal representatives, who, between the dates aforesaid, for six months settled upon, improved and cultivated any land within said second indemnity belt, with a view to homestead or preemption entry, who, being qualified, were not permitted to make such entries, are allowed to enter under the homestead laws a quantity of land, unappropriated and subject to homestead entry, equal to that settled upon, improved and cultivated; and, when making proof and final entry, are entitled to credit for the settlement, improvement and cultivation of said indemnity land.

The entry authorized by this act must be made under the homestead law, and the fact that a claimant had previously made a homestead entry is no bar to an entry under it, provided he was qualified to make the entry made, or intended to be made of said indemnity land, such land being within the State of Minnesota, and that he has not since made entry under, and obtained the benefit of, the homestead law; and in the event of an application to commute, the law applicable to commutations prior to the amendment of section 2301, of the Revised Statutes, by the act of March 3, 1891, will govern.

* Not heretofore reported.

Applicants of the first class for entry under this section will be required to make affidavit as to the facts in relation to their former entries, and as to whether they have received back the fees and commissions, or the purchase money paid upon such entries; and in case they have done so, you will require them to make payment for the land entered under this act.

Applicants of the second class will be required to make affidavit as to the facts relative to their settlement, residence on, and improvement of, the indemnity land aforesaid, and where entry or filing was made, to facts in relation thereto; and where fees and commissions have been returned it will be necessary that payment be made for any entry made under this section.

Said affidavits must be corroborated by at least two witnesses having knowledge of the facts set forth therein, and should satisfactorily show compliance with the requirements of the law to the extent claimed, as they will form a part of the final proof for the land sought.

Under the second section persons entitled to homestead entries under the first section may make such entries of any of the agricultural lands embraced in the provisions of the act of Congress approved January 14, 1889 (25 Stat., 642), entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," upon payment of one dollar and twenty-five cents per acre therefor.

Under the provision of the third section the right of entry given by the act is personal and can not be transferred or assigned, but in case of death of the person entitled to enter, the entry may be made by his heirs or legal representatives; and no valid conveyance, sale, or transfer of the land entered can be made prior to the issue of patent.

Very respectfully,

E. F. BEST,
Assistant Commissioner.

Approved:

HOKE SMITH, *Secretary.*

[PUBLIC—No. 177.]

AN ACT for the relief of settlers on the Northern Pacific Railroad indemnity lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That those persons, their heirs, or legal representatives, who between the fifteenth day of August, anno Domini eighteen hundred and eighty-seven, and the first day of January, anno Domini eighteen hundred and eighty-nine, settled upon and made final proof and entry, under the homestead or preemption laws, of lands within the so-called second indemnity belt of the Northern Pacific Railway Company's grant in the State of Minnesota, which entries were afterwards, without their fault, canceled, upon establishing these facts before the register and receiver of the local land office, in such mode and under such rules as may be prescribed by the Secretary of the Interior, shall be allowed to make final homestead entry, and receive a patent therefor, of a quantity of land of any of the unappropriated public lands of the United States subject to homestead entry, equal in acreage to the land proved up and entered in the said second indemnity belt, as aforesaid,

without being required to make any settlement or improvement upon or cultivation of such land so entered prior to such entry; and those persons, their heirs or legal representatives, who, within the period aforesaid for the space of six months settled upon, improved, and cultivated any of said indemnity lands with a view of entering the same under the homestead or preemption laws, being competent to make such entries, and who were not permitted to make such entries, upon establishing these facts before the register and receiver of the local land office, in such mode and under such rules as the Secretary of the Interior may prescribe, shall be allowed to enter under the homestead laws of the United States a quantity of land of the unappropriated public lands of the United States, subject to homestead entry, equal in amount to the land settled upon, improved, and cultivated, as aforesaid, and under the homestead entry so made, shall, when making proof and final entry, receive credit for the settlement, improvement, and cultivation made upon the said indemnity land as aforesaid: *Provided*, That the law in force in eighteen hundred and eighty-nine governing the commutation of homestead entries shall apply to the commutation of entries under this section.

SEC. 2. That those who are entitled to make the homestead entries prescribed in the preceding section may make such entries of any of the agricultural lands embraced in the provision of an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, upon condition of paying for such lands the price prescribed in said act.

SEC. 3. That the right of homestead entry conferred by the provisions of this act shall not be assignable, and no conveyance, sale, or transfer of the land so entered shall be valid or of any effect if made before patent has issued.

Approved, June 3, 1896.

RED LAKE AGRICULTURAL LANDS—ACT OF JUNE 3, 1896.

INSTRUCTIONS.

Red Lake agricultural lands subject to homestead entry under the provisions of the act of January 14, 1889, may be taken by persons entitled to make entry under the act of June 3, 1896, but entries so made of such lands can not be commuted.

Acting Commissioner Best to the Register and Receiver, Duluth, Minnesota, September 17, 1897.

On August 5, 1896, this office with the approval of the Secretary of the Interior, issued a circular of instructions (25 L. D., 256), for the guidance of local land officers in the treatment of applications by parties claiming the benefits of the act of Congress approved June 3, 1896 (29 Stat., 245), entitled "An act for the relief of settlers on the Northern Pacific Railroad indemnity land."

Recently this office has received communications asking whether the entry authorized by said act can be made on lands known as the Red Lake agricultural lands, ceded and relinquished by the Chippewa Indians under the provisions of the act of January 14, 1889 (25 Stat., 642), and if so, whether the law in force in 1889 governing the commutation of homestead entries applies to entries so made, and whether, in proving up, payment in full can be made, or the entrymen will be required to pay in installments of \$40.00 per annum for five years.

It has been represented to this office that the register at Crookston has ruled that the Red Lake agricultural lands are not subject to entry under the act of June 3, 1896, *supra*.

The first section of said act of June 3, 1896, specifies the parties who are entitled to the benefits intended to be conferred by it, and provides,

That the law in force in eighteen hundred and eighty-nine governing the commutation of homestead entries shall apply to the commutation of entries under this section.

The second section thereof provides

That those who are entitled to make the homestead entries prescribed in the preceding section may make such entries of any of the agricultural lands embraced in the provisions of an act entitled "An act for the relief and civilization of the Chippewa Indians in the State of Minnesota," approved January fourteenth, eighteen hundred and eighty-nine, upon condition of paying for such lands the price prescribed in said act.

Therefore, any of the lands known as the Red Lake lands, agricultural in character and subject to homestead entry under the provisions of the act of January 14, 1889, are subject to the claims of parties entitled to make entry under the provisions of the act of June 3, 1896.

The sixth section of the act of January 14, 1889, provides for the disposal to actual settlers under the homestead laws of certain portions of the lands ceded by the Indians at the rate of \$1.25 per acre, to be paid in five annual payments, and requires due proof of occupancy for five years and full payment before patent can issue. It is clear from these provisions that entries made under said act cannot be commuted.

Where an application is presented for entry of Red Lake lands under the act of June 3, 1896, by a party entitled to make the same, who has completed an entry on the Northern Pacific indemnity lands which has been canceled, the entry will be allowed upon the payment of \$1.25 per acre for the land applied for. And where an application is presented by a party duly qualified to enter, but who has not completed an entry of said indemnity lands, such party when making proof and final entry will be entitled to credit for the settlement, improvement and cultivation of such land; but will be required to make the payments prescribed by the act of January 14, 1889, \$40.00 each year prior to final proof, when the balance due may be paid, or, the whole amount may be paid at any time, but no final certificate as a basis for patent shall issue until proof of occupation for a period, which added to the period of settlement, improvement and cultivation of the indemnity lands aforesaid, shall make five years, shall have been made.

Where a party entitled to the privileges conferred by the act of June 3, 1896, makes entry of land subject to homestead entry, which may be commuted, the law in force in 1889 governing the commutation of homestead entries will apply.

Approved, September 17, 1897.

WEBSTER DAVIS,

Acting Secretary of the Interior.

ABANDONED MILITARY RESERVATION—FORT MAGINNIS.
INSTRUCTIONS.

*Acting Commissioner Best to Register and Receiver, Lewiston, Montana,
September 11, 1897.*

The appraisers have appraised the lands in the Fort Maginnis abandoned military reservation at from one dollar to two dollars per acre.

The Secretary of the Interior has approved the appraisal of the lands appraised at more than \$1.25 per acre, and for lands appraised at less than \$1.25 per acre he has, under the law, fixed the minimum price of such lands at \$1.25 per acre. Therefore, no tract of land in this reservation can be disposed of at less than \$1.25 per acre, although you will be governed by the appraisal in disposing of those lands appraised at more than \$1.25 per acre.

All of the agricultural lands in this reservation are subject to settlement under the public land laws of the United States, under the act of August 23, 1894 (28 Stat., 491), which, among other things provides:

That persons who enter under the homestead law shall pay for such lands at not less than the value theretofore or hereafter determined by appraisement, *nor less than the price of the land at the time of the entry*, and such payment may, at the option of the purchaser, be made in five equal installments, at times and rates of interest to be fixed by the Secretary of the Interior.

On April 9, 1895 (20 L. D., 303), the Secretary of the Interior directed this office to issue instructions under said act of August 23, 1894, as follows:

That the homesteader be given the option in making payment upon his entry of these lands, of making his payments in five equal payments to date from the time of the acceptance of his proof tendered on his entry, and that the rate of interest upon deferred payments be charged at the rate of four per cent per annum.

In allowing entries for lands in this reservation, under said law, you will, in each case, endorse on the application "Fort Maginnis Reservation, Act August 23, 1894," and make the same notation on your abstract of homestead entries.

Under the provisions of the homestead law, an entryman has the right either to commute his entry after fourteen months from the date of settlement, or offer final proof under Sec. 2291 R. S. In entries under said act of August 23, 1894, he may, at his option, commute after fourteen months with full payment in cash, or, after submitting ordinary five years final proof and after its acceptance, he may pay for the land the full amount of the appraised value thereof, without interest, or he may make payment in five equal installments, the first payment to be made one year after the acceptance of his final proof, and the subsequent payments to be made annually thereafter, interest to be charged at the rate of four per cent per annum from the date of the acceptance of final proof until all payments are made.

In case the full amount is paid after fourteen months from date of settlement you will, if the proof is satisfactory, issue cash certificate

and receipt; and in the event that regular final proof is made, and the full amount then paid, you will issue final certificate and receipt; but when partial payments are made the receiver will issue a receipt only for the amount of the principal and the interest paid, reporting the same in a special column of the abstract of homestead receipts, and at the time last payment is made, you will issue the final papers as in ordinary homestead entries.

In issuing final papers you will make the proper annotations thereon, as well as on the applications and abstracts, as before directed, to show that the entry covers land in Fort Maginnis reservation.

You are further advised that the same rule, as to the allowance of credit for residence prior to entry and for military service, applies to entries under said act of August 23, 1894, as to other homestead entries.

Where, upon submitting final proofs the entrymen elect to make payment for the lands entered in five annual installments, you are authorized to make the usual charges for reducing the testimony to writing, but as the final certificate and receipt cannot be issued until the last payment is made you cannot charge the final commissions until said certificate and receipt are issued. Therefore, if the proofs submitted are acceptable, you will make proper notes on your records showing that satisfactory proofs have been made and the dates upon which the partial payments must be made, and then transmit said proofs to this office, in special letters, and not in your monthly returns, for filing with the original entries.

There are no guarantees to be taken in order to secure the payment of the installments, but if, when each installment is due, any entryman fails to pay the same you will report the matter to this office, when proper action will be taken in the case. The act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103), hence parties qualified to make entry under the second section of the latter act will be exempt from the payment required by the said act of August 23, 1894.

Sections 16 and 36 of this reservation are reserved for school purposes.

Since the lists were made up in this office for the use of the appraisers, the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 8, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 17, T. 16 N., R. 21 E., embraced in H. E. No. 336, made by Rezin Anderson, have been patented, and hence, although said tracts have been appraised and are entered on said lists they are not subject to payment under this appraisal.

According to the appraisers lists the alleged townsite of Gilt Edge is situated upon the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21 and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 28, T. 16 N., R. 20 E.

However, a contest was brought against H. E. No. 789, made by Louis Beaupre, February 2, 1895, on the ground of abandonment and the entry canceled by letter "G" of July 14, 1897. One of the allegations against said entry was that the land was covered by the town of Gilt Edge for which formal entry had not yet been made.

In response to their inquiry, the appraisers were directed by telegram of July 23, 1897, to make no appraisal of Gilt Edge town lots until further orders.

The NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, was appraised but the SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 28, T. 16 N., R. 20 E., were not. As this townsite question has not been finally settled, these three subdivisions are not to be disposed of until further orders.

The E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 20, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 29, T. 16 N., R. 20 E., are embraced in H. E. No. 820, made April 26, 1895, by Robert A. Ammon. These tracts are also involved in a contest now pending in the Mineral Division. Hence, payment for them is not to be accepted until further orders.

Finally, tracts known to you to contain minerals are not to be disposed of under this appraisal, which was made for agricultural lands.

You will acknowledge receipt of this letter.

Approved, September 22, 1897.

WEBSTER DAVIS, *Acting Secretary*.

MINING CLAIM—SURVEY—ADVERSE PROCEEDING.

S. H. STANDART ET AL.*

The survey of a mining claim is not vitiated by the fact that the connecting line with the public survey is more than two miles in length, where each corner of said claim is connected, by the survey in question, with other claims that have been officially surveyed.

If, after a mineral entry has been allowed, the entryman finds it necessary to maintain an adverse suit against a conflicting claim, it is incumbent upon the government to take notice of the result of such action, and act accordingly.

Secretary Smith to the Commissioner of the General Land Office, June
(W. A. L.) 13, 1896. (P. J. C.)

The record before me shows that S. H. Standart *et al.* made application for patent for the Treasure Vault mining claim, survey No. 569, Leadville, Colorado, land district, on January 16, 1880; that during the period of publication protests and adverse claims were filed against said entry and suits instituted in support thereof in the district court of Lake county. Subsequently one of the suits, that in behalf of the Tenderfoot mine, was transferred to the federal court of the district of Colorado. That on September 5, 1885, there was filed in the local office a certificate of the district clerk of Lake county that there were no suits pending in that court affecting the title to the Treasure Vault, and thereupon, on September 10, following, mineral entry No. 2569 was made by the applicants.

It having been represented to your office that there were suits pending involving the title to this claim, the matter seems to have rested in abeyance until August 27, 1894, when your office, on consideration of the matter, addressed the register and receiver at Leadville, calling their attention to the fact that in the original field notes of the survey

* Not heretofore reported.

of this claim corner No. 1 was connected to the quarter corner of Sec. 24, T. 9 S., R. 80 W., by a line "S." $89^{\circ} 58' 21''$ W., 13,414.7 feet in length; that by amended field notes, filed June 15, 1880, the course of this connection was changed to make it running N., practically the same course and substantially the same distance. Your office held that such a connection could only be made where the corner was within two miles of the survey, and if there was no public survey within that distance connection should be made with an established mineral monument; also that in the notice of application published this connection was entirely omitted. A new survey was therefore required. Also that there was no evidence in the files of the plat having been posted in the local office during the period of publication, and that this evidence would have to be supplied. Your office also called attention to the fact that there was no evidence showing the disposition of the adverse suit filed by the Tenderfoot mining claim, or that of the Badger Boy No. 2 mining claim. Also that the records of your office show that the owners of the Ellen Morgan lode made application for patent May 14, 1883, and the claimants of the Treasure Vault lode had adversed the same and commenced suit thereon, and that there was no evidence to show what disposition had been made of that suit.

The matter seems to have thus rested until March 15, 1895, when your office demanded a report from the local office as to what had been done in response to your letter of August 27, 1894, and to allow the claimants sixty days within which to furnish the evidence called for, in default of which, or of appeal, the entry would be canceled without further notice from your office.

On May 15, 1895, the applicants filed a petition in the nature of a motion for review of your said office decision of August 27, 1894, in which they set up a full compliance with the law in all respects and that all suits that had been instituted, affecting the title to the Treasure Vault, had been disposed of. And in support of that they filed a certificate from the clerk of the United States circuit court for the district of Colorado showing that the action instituted by the Tenderfoot lode had been decided in favor of its claim October 12, 1883. Also affidavits from the register and receiver at Leadville at the time the application for the Treasure Vault was made, that it was the universal custom of said office to post notices of all mining applications in their office at that time, and that they had reason to and did believe that notice of this application was so posted, and that it was an oversight in not having furnished, at the time, the certificate of that fact required by the rules. There was also a certificate from the clerk of the district court at Leadville, dated January 5, 1895, stating that there were no suits pending in that court at that time involving the title to the Treasure Vault lode; also from the clerk of the circuit court of the United States that there was no suit, wherein the owners of the Treasure Vault were parties, involving the title to the Treasure Vault lode, pending in that court on February 2, 1895.

By letter of July 16, 1895, your office considered the petition or motion for review, and held that there was "no newly discovered evidence, nor showing that claimants are in possession of newly discovered evidence, or evidence that might not have been filed long ago." The motion was therefore adjudged to be filed out of time and would not be considered. It was stated, however, that there was found no good reason for waiving the requirements of your office letters of August 27, 1894, and March 15, 1895, disclosed in the motion and affidavits accompanying the same. Thereupon the applicants prosecute this appeal, both from your decision of March 15, 1895, and July 16th, same year.

The objections raised by your office in regard to this application will be considered in the order in which they are above stated. It must be conceded that the amendment to the official field notes, filed June 15, 1880, is sufficient to correct the error in the course of the line connecting corner No. 1 of the Treasure Vault with the public survey. While it is true that rule 45 of Mining Regulations demands that no connecting line with a public survey shall be more than two miles in length, yet under this rule I do not think a survey should be vitiated if a line should happen to be longer, as in this case, than that mentioned by the regulations. I see no reason why this requirement should render a resurvey necessary, if there is otherwise a substantial compliance with the rules. The presumption would be, I think, that the deputy mineral surveyor, in the performance of his duty as such, would have made the connection a shorter distance if there were any public surveys closer. Examination of the published notice shows that all four of the corners of the claim are tied to mining claims that have been officially surveyed. For instance, corner No. 1 is tied to corner No. 3 of survey No. 595; corner No. 2 is the same as corner No. 1, survey No. 587; corner No. 3 is tied to corner No. 535; and corner No. 4 is tied to No. 5, survey No. 549. It seems to me that this description sufficiently identifies the locus of the claim, so that any person seeking to ascertain its boundaries could do so with as great a degree of accuracy as he could if it were tied to what is stated in the regulations to be the public surveys. Hence, for the purposes of this case, I think that the fact that the Treasure Vault was not connected to the line of the public surveys within a distance of two miles, or to a mineral monument, should not be construed to require a new survey and publication by the applicants. The surveys of mining claims are in their nature public surveys. They are made under the direction of the surveyor-general of the district where they are located, they become a matter of permanent record in the archives of the Land Department, the corners are substantially marked with stone monuments, and their identity is as nearly indestructible as are section corners. As this matter stands at the present time it is simply a question between the government and the entryman as to whether there has been a substantial compliance with the regulations, and it seems to me that there has been in this instance.

The requirement of your office as to the proof of posting a notice in the office seems to me to be sufficient to meet that demand. While the persons making the affidavits, who were then the local officers at Leadville, did not pretend to remember this particular case, or a posting of this particular plat in their office, yet their affidavits are sufficient, in my judgment, to be accepted as a certificate that the posting has been done.

It is shown by the certificates of the clerks of the courts wherein these adverse suits were tried that all of them against the Treasure Vault have been disposed of. It seems that the adverse suit of the Tenderfoot lode claim was decided against the Treasure Vault. It necessarily follows, therefore, that the ground included in that suit will have to be excluded in the Treasure Vault entry.

It is shown by the record that application was made for patent for the Ellen Morgan lode claim in 1883; that the Treasure Vault adversed the same and brought suit in support thereof, and that on April 5, 1886, that suit was still pending and undetermined, as shown by the certificate of the clerk of the court.

But by the certificate of the same clerk, dated January 5, 1895, it is shown

that there is no suit pending in this court wherein the Treasure Vault lode mining claim, Stephen H. Standart, *et al.*, are owners, are either defendants or plaintiffs.

It would seem from this that this action has been disposed of, but what the judgment was is not disclosed.

It is urged that this suit should not be considered as against the application of the Treasure Vault for the reason that it was not an adverse suit against that claim in contemplation of the statute. This position is untenable. The Department has jurisdiction over the land until patent issues, and if after entry has been made the entryman finds it necessary to protect his claim by an adverse suit against a conflicting claim, it is clearly incumbent on the government to take notice of the result of the action and to act accordingly. Suppose, for instance, that the Ellen Morgan was the successful party in this action and was awarded the right of possession of the ground in controversy, could it be maintained that the Department should ignore that judgment and issue its patent to the Treasure Vault, notwithstanding the judgment? What would be the result of such a procedure? There would be two patents out for the same territory, because the Ellen Morgan would clearly be entitled to the possession and patent on its judgment.

It seems to me that the Department should be advised of the result of the action of the Treasure Vault against the Ellen Morgan and be controlled thereby in issuing its patent to the former.

Your office judgment is therefore modified, and you will require the appellants to have an amended survey made of the Treasure Vault, excluding the ground awarded the Tenderfoot by the judgment of the United States circuit court; also to file the judgment roll in its suit

against the Ellen Morgan, and if it is found that the judgment was in favor of the latter the territory awarded it should also be excluded in said amended survey. You will give the appellants reasonable time to comply with this order.

INDIAN LANDS—ACTS OF JUNE 5, 1872, AND FEBRUARY 11, 1874.

BREANNAN *v.* FERRELL.

The act of June 5, 1872, in providing for the survey and disposition of fifteen townships "above the Lo Lo Fork" contemplated entire townships irrespective of the time when said survey might be made, either in whole or in part.

The second section of the act of February 11, 1874, in extending the benefit of the homestead act to such settlers within said fifteen townships "as may desire to take advantage of the same," does not operate to repeal the general provisions for the disposition of said lands made by the act of June 5, 1872.

The time allowed to settlers on said lands, whose settlement is made after the passage of the act of 1872, to perfect title under said act, and the amendatory act of 1874, begins to run from the date of settlement.

Under the provisions of section 10, act of March 3, 1891, with respect to the disposal of Indian lands, the general repeal of the pre-emption law, by section 4 of said act, does not affect the disposition of these lands under the acts of 1872 and 1874.

Secretary Bliss to the Commissioner of the General Land Office, September 22, 1897.
(F. L. C.) (W. M. W.)

The case of Edward Breannan *v.* Joseph Ferrell has been considered upon the appeal of the former from your office decision of November 9, 1895, holding for cancellation said Breannan's homestead entry as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24, and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, in T. 5 N., R. 20 W., Missoula, Montana, land district.

The first survey ever made in said township was made in 1872, and covered only about one-half of a full township. The remainder of said township—being that portion in which the land herein involved is situated—was made in the field in August, 1893, the plat was received in the local office in July, 1894; and on August 23 of that year Joseph Ferrell filed pre-emption declaratory statement for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 24, and the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 25 of the above-named township and range, alleging settlement on said land September 15, 1893.

On October 8, 1894, Edward Breannan made homestead entry for the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 24 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 25, of said township and range.

The claims of Ferrell and Breannan conflict as to the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 24 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 25.

On February 18, 1895, Ferrell made final proof in support of his claim before a United States commissioner, at Hamilton, Montana. At the time it was made Breannan appeared and cross-examined Ferrell's witnesses, and both parties submitted testimony in support of their respective claims.

On March 19, 1895, the register and receiver considered the evidence and decided that Ferrell had acted in good faith, and recommended that his final proof be approved.

Breannan appealed.

On November 9, 1895, your office affirmed the judgment of the register and receiver, and held Breannan's entry for cancellation, in so far as it conflicts with Ferrell's declaratory statement.

Breannan appeals.

He assigns the following errors:

1. Error in deciding that the land in controversy was subject to pre-emption, under the act of June 5, 1872, and acts amendatory thereto, at the time claimant Ferrell made his D. S. No. 558, or at any other time; and that said entry should stand intact and his final proof (be) approved, and that Breannan's H. E. No. 1132 should be canceled as to said land.
2. Error to rule that the quit claim deed marked exhibit "A" described the land in controversy as a part of the Turk ranch, and that said land was not a part of the "Derby claim" purchased by said Edward Breannan.
3. Error to decide that claimant established a *bona fide* residence on the land in controversy, and that he acted in good faith, and that his residence on the land had been continuous.
4. Error in deciding in favor of the claimant on the merits.

For the purpose of determining this controversy these alleged errors may be grouped together under two heads,—the first one considered under one head, and the three last under the other. They will be considered in their inverse order. The three last alleged errors relate to the facts. The evidence respecting each one of them is conflicting in character. The register and receiver and your office found the facts against the claims of the appellant and in favor of Ferrell. Under such circumstances the Department has repeatedly held, that it will not disturb on appeal the concurring decisions of the local officers and your office on questions of fact, unless clearly wrong. *Scott v. King*, 9 L. D., 299; *Conley v. Price*, Id., 490; *Finan v. Palmer et al.*, 11 L. D., 321; *Cleveland v. North*, Id., 344; *Epps v. Kirby*, 15 L. D., 300.

A careful examination of the evidence fails to disclose any sufficient reason for interfering with the conclusions reached by the local officers and your office upon the facts. This disposes of the second, third and fourth specifications of error alleged in the appeal.

The only remaining questions to be determined are raised by the first specification of error. Ferrell filed his declaratory statement under the act of June 5, 1872 (17 Stat., 226), and bases his claim to the land in controversy upon said act. If for any reason the land in controversy is not subject to disposition under the act of 1872 and amendments thereto, then Ferrell's claim must necessarily be denied; if the land in controversy is subject to disposal under said act and amendments to it, then Ferrell's right to such land, as against Breannan's claim, must be upheld and sustained.

The land involved herein is situated in the valley of the Bitter Root River in Montana above the Lo-lo fork of said river, and in order to

determine the question raised by the first specification of error in the appeal, it seems to be necessary to examine into the condition of the land in question before and at the date of the passage of the act of June 5, 1872, and since that time.

By the treaty between the United States and the chiefs, headmen and delegates of the Flathead and other confederated tribes of Indians, concluded at Hell Gate in the Bitter Root Valley, July 16, 1855, ratified by the Senate March 8, 1859 (12 Stat., 975), certain lands were ceded to the United States by said Indians, out of which was carved an Indian reservation called the Jocko reservation. The 11th article of said treaty provided that the Bitter Root Valley above Loo-lo fork, shall be carefully surveyed and examined, and if it shall prove, in the judgment of the President, to be better adapted to the wants of the Flathead tribe than the general reservation provided for in this treaty, then such portions of it as may be necessary shall be set apart as a separate reservation for said tribe. No portion of the Bitter Root Valley, above the Loo-lo fork, shall be open to settlement until such examination is had and the decision of the President made known.

On the 14th of November, 1871, the President issued his proclamation reciting that:

The Bitter Root Valley, above the Loo-lo fork, in the territory of Montana, having been carefully surveyed and examined, in accordance with the eleventh article of the treaty of July 16, 1855, concluded at Hell Gate in the Bitter Root Valley has proved, in the judgment of the President, not to be better adapted to the wants of the Flathead tribe than the general reservation provided for in said treaty. It is therefore deemed unnecessary to set apart any portion of said Bitter Root Valley as a separate reservation for Indians referred to in said treaty.

It was further ordered and directed that all Indians residing in said Bitter Root Valley should be removed to the reservation provided for in the second article of the treaty of 1855; that an appraisement of the improvements made by the Indians upon any lands of the Bitter Root Valley should be made. Said proclamation

further ordered that, after the removal herein directed shall have been made, the Bitter Root Valley aforesaid shall be open to settlement. (See Executive orders relating to Indian Reserves issued prior to April 1, 1890, pp. 40 and 41.)

An examination of the plats of survey of your office discloses the fact that a part of T. 12, R. 20 *below* the Lo-lo fork was surveyed in 1870, and that no part of the Bitter Root Valley *above* the Lo-lo fork of said river was surveyed until 1872, that portions of said valley above the Lo-lo fork were surveyed in the years 1872, 1879, 1889, 1890, 1891, 1892 and 1893. A plat showing said surveys in different colors has been prepared in your office and accompanies this decision for the purpose of reference. The yellow-colored part of said plat shows the land which was surveyed in 1872, and that portion within the red lines shows the land which was surveyed in 1893.

The act of June 5, 1872 (17 Stat., 226), by the first section made it the duty of the President, as soon as practicable, to remove the Flat-

head and other Indians connected with said tribe from the Bitter Root Valley, in the then territory of Montana, to the Jocko reservation, created by the treaty of 1855, *supra*.

The second section of said act provided :

That as soon as practicable after the passage of this act, the surveyor-general of Montana Territory shall cause to be surveyed, as other public lands of the United States are surveyed, the lands in the Bitter Root Valley lying above the Lo-lo fork of the Bitter Root river; and said lands shall be open to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers, being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of settlement, or of the passage of this act. The sixteenth and thirty-sixth sections of said lands shall be reserved for school purposes in the manner provided by law. Townsites in said valley may be reserved and entered as provided by law: *Provided*, That no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act: *And provided further*, That none of the lands in said valley above the Lo-lo fork shall be open to settlement under the homestead and pre-emption laws of the United States. An account shall be kept by the Secretary of the Interior of the proceeds of said lands, and out of the first moneys arising therefrom there shall be reserved and set apart for the use of said Indians the sum of fifty thousand dollars, to be by the President expended in annual installments, in such manner as in his judgment shall be for the best good of said Indians, but no more than five thousand dollars shall be expended in any one year.

The act of February 11, 1874 (18 Stat., 15), provides :

That the time of sale and payment of pre-empted lands in the Bitter Root Valley, in the Territory of Montana, is hereby extended for the period of two years from the time allotted in the act, entitled "An act to provide for the removal of the Flat-head and other Indians from the Bitter Root Valley, in the Territory of Montana," approved June fifth, eighteen hundred and seventy-two.

SEC. 2. That the benefit of the homestead act is hereby extended to all settlers on said lands who may desire to take advantage of the same.

The act of June 5, 1872, clearly contemplated that fifteen townships of land, above Lo-lo fork of the Bitter Root river, except sections sixteen and thirty-six and townsites in each township, should be set apart and sold for cash to actual settlers possessing the qualifications, and upon the terms and conditions specified in the act. The proceeds of the sales of said lands were to be "reserved and set apart for the use of" the Indians referred to in said act, and were to be expended by the President in annual installments, in such manner as in his judgment "shall be for the best good of said Indians." The act amounted to a legislative reservation, from disposition under the homestead or pre-emption laws, of all the land embraced in the fifteen townships. The reservation was made for the purpose of raising a fund by the sale of the land, except sections sixteen and thirty-six, and the townsites included in said townships. The fund to be raised from such sales was to be expended in a particular manner, i. e., for the benefit of the

Indians named in the act. By its terms "none of the lands in said valley above the Lo-lo fork" were to be "open to settlement under the homestead and pre-emption laws of the United States."

This act being passed after the President's order of November 14, 1871, declaring said lands open to settlement, would in effect abrogate and supersede said executive order in so far as it declared the lands in the Bitter Root Valley above the Lo-lo fork open to settlement.

By reference to the plat before referred to, it will be seen that the Land Department took steps to carry out the requirements of the act of 1872 by causing a survey of fifteen townships, a part of which are fractional—one of the fractional townships being T. 5 N., R. 20 W., in which the land in controversy is situated. A copy of said survey was filed in the proper local land office. This survey was approved as designating the fifteen townships contemplated by the act of 1872. See *Hinchman et al. v. McClain*, 12 L. D., 49.

In view of the provisions of the act of 1872, and the action of the Department respecting the township in which the land involved is situated, it is clear that the contention of counsel for Breannan, that the act of 1872 never applied to the land in controversy, is not well taken. While it is true that only about one-half of said township was surveyed and plat filed in 1872, and the remaining portion of it was not surveyed until 1893, both surveys covered portions of the same township; these facts do not take the land in controversy out of the act of 1872, for it referred to whole townships irrespective of the time or times the survey thereof might be made or completed.

The next question that arises is, what effect, if any, did the act of 1874 have upon claimants under the act of 1872, of lands included in the fifteen townships required by said act to be sold, and the proceeds used for the benefit of the Indians. Said acts being *in pari materia* should be construed together; and if their respective provisions can be harmonized, then both should be given force and carried out. The act of 1872 required to be surveyed "the lands in the Bitter Root Valley lying above the Lo-lo fork of the Bitter Root river." This evidently means that all the land in the Bitter Root river valley above the Lo-lo fork should be surveyed. Out of all such lands so required to be surveyed "no more than fifteen townships" were to be subject to sale under the act; all the remaining lands so situated were withheld from disposition under the homestead and pre-emption laws. Under said act lands in said valley, situated outside of the fifteen townships, occupied the status of reserved lands after they should be surveyed. Inasmuch as the land involved in this controversy is within one of the fifteen townships set apart under the act of 1872 to be sold for the benefit of the Indians, it is not material to determine whether the lands in said valley situated outside of the fifteen townships have been released from reservation by the act of 1874, or whether such lands are subject to entry under the homestead law since the passage of said act. In deter-

mining this case these questions are not material; therefore, the discussion will be confined to the effect of the act of 1874, in so far as it relates to lands within the fifteen townships required to be disposed of under the act of 1872.

The first section of the act of 1874 extended the time of sale and payment for a period of two years from the time allowed by the act of 1872, for such lands as were authorized to be sold under the act of 1872. The second section extended the benefit of the homestead act to such settlers in the Bitter Root Valley "as may desire to take advantage of the same." This language is permissive in character, and does not imply that settlers on lands included within the fifteen townships may not, if they so elect, acquire title to such lands under the act of 1872.

Repeals by implication are not favored. There is no repealing clause in the act of 1874, nor is there anything in the language used in it to indicate that Congress intended by its passage to repeal that portion of the act of 1872 which related to the disposal of land in the Bitter Root Valley to the extent of fifteen townships.

There is no such inconsistency between the acts of 1872 and 1874 as would justify the conclusion that both of said acts may not stand.

A question somewhat similar to the one here presented came before the Department in the case of *Wenie et al. v. Frost*, 4 L. D., 145, 6 L. D., 175, and, on review, Id., 539; again, on review, 9 L. D., 588. Said case finally reached the supreme court of the United States, and was decided March 4, 1895. See *Frost v. Wenie*, 157 U. S., 46 *et seq.* The Department held, in effect, and the supreme court approved the finding, that where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, and no purpose to repeal the earlier act is expressed or clearly indicated, the court will, if possible, give effect to both acts.

It is claimed by counsel for Breannan that Ferrell's declaratory statement was illegal and invalid, for the reason that settlement was not made until September 15, 1893, or until after the repeal of the pre-emption law by act of March 3, 1891 (26 Stat., 1095).

The claim that Ferrell's declaratory statement was invalid, for the reason that settlement was not made until 1893, may be briefly examined before considering the question as to whether the act of 1872 was repealed by the act of 1891.

The act of 1872 required payment for land to be made "within twenty-one months from the date of settlement, or of the passage of this act." As to the time allowed purchasers under its provisions, it gave all settlers on the lands at the time the act was passed twenty-one months after the act was passed to make payment, without respect to the time they had been residing on said lands; in this respect it related to existing settlers on the land. It also clearly contemplated such settlers as might make settlement after the act was passed. The limitation as to the time within which future settlers were required to

pay for the land commenced to run "from the date of settlement," and not from the passage of the act. The first section of the act of 1874 simply extended the time of sale and payment of pre-empted lands "for the period of two years from the time allotted in the act of" 1872.

Ferrell's settlement upon the tract in dispute was made on September 15, 1893, and he made his proof February 18, 1895, seventeen months and three days after his settlement, which was in ample time under the law.

The question as to whether the act of March 3, 1891 (26 Stat., 1095), repealed the acts of 1872 and 1874 will next be considered.

The fourth section of said act is as follows:

That chapter four of title thirty-two, excepting sections twenty-two hundred and seventy-five, twenty-two hundred and seventy-six, twenty-two hundred and eighty-six, of the Revised Statutes of the United States, and all other laws allowing pre-emption of the public lands of the United States, are hereby repealed, but all bona-fide claims lawfully initiated before the passage of this act, under any of said provisions of law so repealed, may be perfected upon due compliance with law, in the same manner, and upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed.

The language used in the foregoing section is broad and comprehensive in its scope. At the same time this section must be construed in connection with other provisions of the act in which it is found. In other words, the whole act must be construed together. Section ten of said act is as follows:

That nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes and the proceeds thereof to be placed in the treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements, except as provided in section 5 of this act.

Section 5 of the act amends sections 2289 and 2290 of the Revised Statutes. These sections refer to homestead entries of public lands.

In *Northern Pacific Railroad Company v. Eberhard*, 19 L. D., 532, and the same *v. Haynes*, 20 L. D., 90, the Department held that the lands in the Bitter Root Valley above the Lo-lo fork were within the reservation created by the Indian treaty of July 16, 1855, and therefore excepted from the grant to the Northern Pacific Railroad. In *Northern Pacific Railroad Company v. McClay et al.* the United States circuit court of appeals for the ninth circuit held the same view. See 61 Fed. Rep., 554. As hereinbefore shown, the act of 1872 embraced in its provisions lands that had theretofore been reserved by treaty with the Indians. The lands authorized to be sold by the terms of said act were to be disposed of for the benefit of said Indians; the first moneys derived from the sales of such lands, to the amount of \$50,000, were to be "reserved and set apart" for the Indians; an account of the proceeds was to be kept. It is clear that under the tenth section of the act of 1891, the disposition of these lands is to continue in accord-

ance with the act of 1872 and the act of 1874, except as to such settlers on said lands as may desire to make entries under the homestead law; that said section clearly takes the disposition of the land in question out of the repealing provisions of section 4 of said act.

For the foregoing reasons, your office decision appealed from is affirmed.

This decision, which reaches the same conclusion as that of September 8, 1897, is substituted therefor.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

JACKSON ET AL. v. GARRETT.

Going upon the land may be properly regarded the initial act of settlement, as between parties that make the race at the hour of opening, and are aware of a common intent to settle on the same tract.

On a charge of prior settlement against a homestead entry the contest must fail, if the fact of actual priority is not shown by a preponderance of the evidence.

The fact that a contestant may waive a charge, made by him against an entry, does not relieve the Department from the duty of ascertaining from the record the facts, bearing on an alleged violation of law, that may directly affect the integrity of the entry.

Presence within the territory during the inhibited period does not operate as a disqualification if no advantage is sought or gained thereby.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) September 22, 1897. (G. B. G.)

This case is before the Department on two motions for review of departmental decision herein of August 28, 1896, sustaining the homestead entry of the defendant, Samuel G. Garrett, for the SW. $\frac{1}{4}$ of Sec. 18, T. 17 N., R. 1 E., Guthrie, Oklahoma.

This land is embraced within the Iowa reservation, which became open to settlement and entry at twelve o'clock, noon, September 22, 1891, under the provisions of the act of February 13, 1891 (26 Stat., 758), and the President's proclamation of September 18, 1891 (27 Stat., 989). The tract is located on the western boundary line of the reservation. The town of Langston lies immediately adjacent thereto on the west.

On the day of the opening all of the parties, to wit, Marinda Jackson, Annie Allen, Albert L. Ayers, and Samuel G. Garrett, were located within a few feet of each other, on the line near the southwest corner of the tract. The twelve o'clock signal was given by the firing of a gun in the hands of a deputy United States marshal, and each of the parties named stepped directly across the line onto the land in controversy, asserting claim thereto. Immediately after driving a stake, Garrett started to the local office and made entry of land. This entry was contested by Ayers, alleging priority of settlement, and claiming that

Garrett was disqualified by reason of "soonerism." Mrs. Jackson and Mrs. Allen applied to enter the land, each alleging prior settlement as against Ayers and Garrett, but not as against each other, they each admitting that their settlements were simultaneous.

A hearing was ordered, all parties appearing before the local office on May 16, 1892. Trial was duly had, and on December 16, 1893, the local officers held that the charge of "soonerism" on the part of Garrett had not been sustained, that the parties made simultaneous settlement, but that Garrett was the first to make substantial improvements and entry, and recommended that Garrett's entry be held intact.

On appeal your office reversed the local officers, holding that Garrett was disqualified by reason of premature entry, and held his entry for cancellation for that reason; and further held that the respective settlements of the other parties were simultaneous, and directed a division of the land between Ayers, Allen and Cox.

On appeal from your office, it was here held:

Ayers not only alleges priority of settlement, which places upon him the burden of proof to maintain that allegation, but he likewise alleges that Garrett was not the prior settler, which allegation he should sustain by a preponderance of evidence. At the hearing the plaintiff waived the proving of the charge of disqualification, and to consider what testimony was introduced on that point would be taking advantage of the fact that Garrett was not afforded full opportunity to defend that charge, and his objection to its being considered is sustained.

In the matter of settlement it has been found, both by the local office and your office, that Jackson, Garrett and Ayers went upon the land at the same time. An examination of the record sustains this finding, and it must, therefore, be held that Jackson and Ayers have not sustained their allegations by a preponderance of evidence. In view of this, the entry of Garrett must stand intact.

This decision is alleged to be erroneous, substantially in this:

First: That the mere going upon the land by either of the parties was no notice to the others; that the first act of giving notice of which either of the others was charged, was the driving of stakes or claiming the land by word of mouth, and each insists that his acts in this regard were in advance of all others;

Second: That the record shows Garrett to have gone upon the land prematurely, and the government being a party in interest, it was error to refuse to consider testimony introduced on that point, although the contestants had waived that charge in the record when called upon to make a deposit to cover all expenses of taking testimony in relation thereto.

It is further urged that the record shows that Garrett made his first act of settlement on land other than that here involved, but the clear preponderance of the testimony shows that he stuck his stake on the quarter section here in issue.

The record has been carefully examined. The conflict of testimony is so great as to be altogether inexplicable except on the theory that many of the witnesses were not testifying in good faith.

I think it is absolutely certain, however, that all of the parties stepped onto the land at practically the same instant of time. It is not material, in my judgment, which stake was driven first, for the reason that it is fairly inferable from the record that each of the parties knew of the others' intention to settle on this particular land. Your office so found; and while there was no evidence introduced specifically with reference to this fact, there are many things in the record to justify this finding. This being true, the going on the land, as between these parties, was the initial act. Each had notice of the others' intention, and it was simply a question of who got on the land first. All subsequent acts of settlement, as between them, relating back to that time. It follows, therefore, these parties having made simultaneous settlement, the entry of Garrett must stand, unless he is disqualified by going on the land during the prohibited period. *Sumner v. Roberts* (23 L. D., 201.)

The Department was in error in the decision under review in sustaining the objection of Garrett to the consideration of testimony relating to this alleged disqualification.

The government is always a party in interest in litigations of this character, and the fact that the contestant waived the charge of disqualification, did not relieve the Department of the duty of ascertaining from the record the facts bearing on an alleged violation of law, which went directly to the integrity of the entry.

The record has now been examined with special reference to this issue between Garrett and the government, and it is found that it is not shown by a clear preponderance of the testimony that Garrett was on this land or in prohibited territory during the prohibited period. This, like all the other questions in the case, is made difficult to decide by a conflict of testimony which is irreconcilable. But it is clear that he could have had no motive in going on the land inimical to the government or prejudicial to the rights of others, and it is absolutely certain, that if he was on the land he secured no advantage thereby over these contestants or any other person. He lived in Langston and had lived there for some time. Nearly the whole of this quarter section is in plain view from the town, and everybody who lived there knew, or could have known, all about the tract, without violating the law.

The entry of Garrett will remain intact, subject to his compliance with law.

The motions for review are denied.

SNYDER *v.* WALLER.

Motion for review of departmental decision of July 12, 1897, 25 L. D., 7, denied September 22, 1897, by Acting Secretary Davis.

HOMESTEAD-CONTEST—SETTLEMENT RIGHT—AMENDMENT.

HADLEY v. WALTER.

A settler who makes entry for part of the land covered by his settlement claim, and contests a prior entry covering the remainder, may be permitted to amend his first entry, so as to include the whole of his original claim, on the successful termination of his contest.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) September 22, 1897. (C. W. P.)

This case involves the right to the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 28, T. 28 N., R. 9 W., Alva land district, Oklahoma Territory.

The record shows that on November 7, 1893, the contestee, John W. Walter, made homestead entry No. 2713, of the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said section 28; that on November 14, 1893, the contestant, Alfonso W. Hadley, made homestead entry No. 2937 of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section, and on November 18, following, filed affidavit of contest as to the N. $\frac{1}{2}$ of said SW. $\frac{1}{4}$, alleging that he made settlement on said SW. $\frac{1}{4}$ prior to said entry.

A hearing was had on January 3, 1895.

On July 27, 1895, the local officers rendered their decision, recommending that said contest be dismissed, on the ground that the plaintiff had exhausted his homestead right. The plaintiff appealed. Your office affirmed the judgment of the local officers. The plaintiff appeals to the Department.

The evidence shows that the contestant went upon the SW. $\frac{1}{4}$ of said section on October 25, 1893, and threw up several mounds of earth on different parts of the tract; that he then went into the camp of the parties who accompanied him into the Territory, where he spent the night; that on the following morning, he returned to the land, and plowed around the quarter section, as nearly as he could tell where the lines ran. He also started a well near the centre of the claim, which he dug to the depth of three or four feet. He then went to his home in Lyons, Kansas, to get money with which to file on the claim. There he found his wife and children sick, and went to work to support them, and as soon as they were better he went to Alva, to make entry of the land. When he arrived at the land office he found a large crowd there, waiting to file, and had to wait ten days before he could file, when he found that the N. $\frac{1}{2}$ of the quarter section had been filed on. Acting on the advice of counsel, he then, on November 14, 1893, made his homestead entry for the S. $\frac{1}{2}$ of the tract, at the same time executing his affidavit of contest, which he filed November 18, 1893. He then went back to his home in Kansas, with the intention of moving upon the land as soon as possible, but was out of money and went to work, but was taken ill with pneumonia about the third of December, and lay ill in bed until about the first of March. His children were also sick, and he could not return to the land until March, 1894, when he went upon his claim, and built a shanty, and on or about March 22,

1894, established residence on the land, and has resided there since that time. He has about forty acres of land under cultivation.

The contestee, Walter, went upon the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of the section on September 27, 1893, and set a stake, and October 25, 1893, he started a dugout on the land in controversy. On November 7, 1893, he made his entry. He then returned to his home in Kansas, where he remained until February 14, 1894, when he came back to his claim, built a house, and on March 14, 1894, he established his home upon the land, and has continued to reside thereon since that time. He has about twenty-three acres of land in cultivation.

Your office, affirming the judgment of the local officers, simply held that the contestant had exhausted his homestead right by making entry of the S. $\frac{1}{2}$ of the quarter section. But in the view I take of the case it is necessary to decide the question of priority of settlement.

It is well settled that one who claims the right to make a homestead entry by reason of priority of settlement, must show that the alleged settlement was followed up within a reasonable time by the establishment and maintenance of residence. It must be conceded that the acts of settlement by the contestant were a sufficient notice of his intention to claim the land. But it is contended that they were not followed up with reasonable diligence by residence and substantial improvements and cultivation, and the contestant sets up as an excuse for his failure to improve the land and establish residence at an earlier date his poverty and the sickness of himself and his family. And I think the facts sworn to are a sufficient excuse and leave no reasonable doubt that his settlement was made in good faith.

The question, then, recurs—Did the contestant exhaust his homestead right by making homestead entry of the S. $\frac{1}{2}$ of the quarter section? I think, under the circumstances of this case, that the contestant can not be regarded as having elected to take only eighty acres of land, and thus waived his right to a larger quantity. He evidently intended to take the whole quarter section, and simply mistook his remedy. When he found that the contestee had made homestead entry of the N. $\frac{1}{2}$, he should have applied to enter the whole quarter section and filed his contest against the contestee's entry of the N. $\frac{1}{2}$. As it is said in the case of *Crail Wiley* (3 L. D., 429),

It is the duty of the Department to aid rather than obstruct the prosecution of settlement rights, and all cases should be fairly heard and adjudged upon their merits, without the restriction of technical regulations,

and in the case of *Robert C. Bell* (19 L. D., 177,) it is said, that no technical rule should stand in the way of allowing the claimant to take the land which the law clearly contemplated that he might take. See also the case of *Gourley v. Countryman* (on review), 24 L. D., 342, where it was held that:

The cancellation of a homestead entry as to part of the land covered thereby, on account of an adverse claim, will not prevent the entryman from subsequently asserting his right as a settler to the entire tract covered by his original entry, as against a third party.

For these reasons, your office decision is reversed. Walter's homestead entry as to the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 28, will be canceled and Hadley allowed to amend his entry so as to include said N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said section 28.

STATE OF OHIO.

Motion for review of departmental decision of June 15, 1897, 24 L. D., 522, denied by Acting Secretary Davis; September 22, 1897.

TIMBER CUTTING—RAILROAD LIMITS.

ROBERT C. ROGERS.

Permits to cut timber within the primary limits of the Northern Pacific grant will not be issued prior to an official survey of the lands.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) *September 22, 1897.* (F. W. C.)

With your office letter of April 29, 1897, was forwarded an appeal by Robert C. Rogers from your office decision of March 8, 1897, rejecting his application for a permit to cut timber on certain unsurveyed lands in the Missoula land district, Montana, for the reason that said lands are shown to be within the primary limits of the grant to the Northern Pacific Railroad Company.

Your action is based upon departmental decision of February 3, 1892 (14 L. D., 126), in which it was held that permits will not be issued under section 8 of the act of March 3, 1891 (26 Stat., 1093), to cut timber from the unsurveyed lands within the primary limits of the Northern Pacific grant, in the absence of a showing that the land is mineral in character.

In said decision it was held that:

Until surveyed, it can not, with any degree of certainty, be held that any particular piece of land will, upon survey, form a part of an even numbered section.

In the appeal it is urged that by a private survey made by the Northern Pacific Railroad Company the tracts covered by the permit are shown to be sections 10 and 12 of township 26 north, range 34 west.

Without attempting to question the correctness of the survey referred to, it is sufficient to say that the same is in nowise an official survey of the land, and after a consideration of the matter the previous opinion of the Department, before referred to, is adhered to, and your office decision denying the application under consideration is accordingly affirmed.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

THOMPSON ET AL. v. CRAVER.

The period of inhibition against entering upon lands within the Cherokee Outlet begins to run from the date of the President's proclamation opening said lands to settlement.

A contestant whose success is dependent upon his showing priority of settlement must also show that such settlement was followed by the establishment and maintenance of residence.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) *September 22, 1897.* (E. M. R.)

This case involves the SW. $\frac{1}{4}$ of Sec. 8, T. 26 N., R. 1 E., Perry land district, Oklahoma Territory, and is before the Department on motion for review, by the heirs of G. Gottlieb, of departmental decision of date July 12, 1897 (unreported), dismissing the contest of said Gottlieb against the entry of one Henry Craver for this land, canceling the soldier's declaratory statement of the said Craver for the land in controversy and awarding a preference right of entry to William H. Thompson, another contestant against said entry.

When this cause came on for hearing before the local officers, they rendered a decision recommending the cancellation of the entry of Craver, the dismissal of the contest of one Cummings, who had also filed an affidavit of contest against said entry, the dismissal of the contest of Gottlieb, and that a preference right of entry be awarded to said Thompson.

Upon appeals filed by Rachel Gottlieb, widow of said Gottlieb, who died February 23, 1895, and Cummings, your office decision of March 2, 1896, was rendered, in which was affirmed the recommendations of the local office. Further appeal by Rachel Gottlieb resulted in the decision of the Department now sought to be reviewed and set aside.

The said decision of the Department affirmed the judgment of your office in its findings of fact and its application of law thereto.

The motion for review alleges various errors of fact and law. It is contended that Thompson was disqualified from making homestead entry within the Territory of Oklahoma by reason of having entered said Territory in violation of law prior to the time set therefor by the proclamation of the President, in that, subsequent to the passage of the act opening said lands to entry, but prior to the proclamation of the President fixing a date therefor, in accordance with the terms of the act, the said Thompson entered upon said lands, and it is maintained that said entry disqualified him as an entryman for said lands.

The decision complained of, upon the facts of such entry found as follows:

From the evidence of Thompson, as found in the record, it appears that during this trip in the Territory at the time mentioned above, he passed over a portion of the land in controversy and was with a person who was measuring sections in that immediate locality.

That decision admitted that such acts upon the part of Thompson were sufficient to bring him within the rule disqualifying him from acquiring title to lands within the Territory of Oklahoma, provided there was at such time—the month of July—an inhibition against entering upon said lands, but under the authority of *Townsite v. Morgan et al.*, and the same *v. Traugh et al.* (21 L. D., 496), and *Bowles v. Fraizer* (22 L. D., 310), it was determined that at such time no prohibition was in existence, and that the period of prohibition commenced to run only from the date of the proclamation of the President—August 19, 1893.

The motion for review does not undertake to cite authorities contrary to the rule there announced, or to show in any way where said holding was erroneous, and as it is in accordance with the decisions of the Department and the acts relative to Oklahoma Territory, it is adhered to.

It is contended that the Department was in error in finding that Thompson ever established residence upon the land, in not finding that Gottlieb settled first, and that he within a reasonable time established residence thereon, and that if he did not in a reasonable time, he was prevented from doing so by force upon the part of Thompson, and further, that having an application pending to enter, until such application was allowed it was not incumbent upon Gottlieb to reside upon the land.

In reference to the various assignments of error, it appears to be sufficient to say that upon all the material questions urged by the petitioner, concurring decisions adverse to his position have been rendered. The decision of the Department held that Gottlieb failed to comply with the requirement of the law as to the establishment and maintenance of residence, and that the excuses offered by him were insufficient. This finding was conclusive of his case. The point now urged by his attorney, that pending the allowance of his entry he was not compelled to do so, is not well taken.

Rights to agricultural public land may be initiated by settlers in three ways: by entry, by contest, and by settlement. Contests are divisible into two classes: first, where the allegation is failure to comply with the law on the part of the entryman, irrespective of any superior right alleged by the contestant; and second, where the contest is based upon the assertion of superior rights and is not dependent upon delinquencies upon the part of the entryman. The difference between these two classes of contests is material and has been recognized by the Department. *Hall v. Stone* (16 L. D., 199), *Cotter v. McInnis* (21 L. D., 97), and *Foote v. McMillen* (22 L. D., 280).

Therein it is held that where a contest is based solely upon the laches of the defendant it is not incumbent upon the contestant to reside upon the land pending a determination of the contest, but that a contest filed, alleging superior rights, by reason of prior settlement, to that of the entryman, must be accompanied by the maintenance of residence.

The reason of this holding is apparent when it is remembered that pending contest an entryman must reside and continue his improvements upon the land despite the doubtful tenure of his holding, and the contestant so alleging prior settlement should be constrained to do as much. Settlement alone, of itself, does not confer a complete right. It is settlement followed by residence and the putting of record of one's claim that ripens into a vested right.

It may be that where one alleging prior settlement files a contest, he may elect to stand by either the act of settlement or the filing of the contest. But in such a case election must be made.

In the case at bar, Gottlieb acquired no right by reason of his filing a contest, as such filing was subsequent in point of time to the settlement of Thompson. Therefore he must stand upon his settlement—the allegation of superior rights to the other parties to the cause—and so alleging it is incumbent upon him not only to show settlement, but continuous residence thereon. This it has been held in all decisions he has not done.

The motion for review is denied.

HOMESTEAD ENTRY—RESIDENCE—ACT OF JULY 26, 1892.

McPEEK v. SULLIVAN ET AL.

Under a homestead entry made by the heirs of a successful contestant in accordance with the act of July 26, 1892, actual residence on the land is not required, if cultivation thereof is shown for the requisite period.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) September 22, 1897. (G. C. R.)

The case of Timothy B. Sullivan v. George S. McPeek, involving lots 1 and 2, and the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 6, T. 18 N., R. 3 W., Guthrie land district, Oklahoma, was decided by the Department on October 14, 1893 (17 L. D., 402), and your office decision holding McPeek's entry of the land for cancellation was affirmed. Before the decision of the Department was rendered, the death of the plaintiff was made known, and a motion was filed asking that the heirs of the plaintiff be substituted, etc. It appearing that the heirs of the contestant were citizens of the United States, the Department directed that they be substituted for the deceased plaintiff, under and by virtue of the provisions of the second section of the act of July 26, 1892 (27 Stat., 270).

In pursuance of this judgment, John D. Sullivan, on December 27, 1894, made homestead entry of said land, the receiver's receipt specially reciting that the entry was made under section 2290 of the Revised Statutes of the United States, "and act of July 26, 1892, 27 Statutes at Large of United States, page 270."

The application was accompanied by a power of attorney, made and duly acknowledged by William, David C., and James H. Sullivan

and Sarah Dunlee, brothers and sister of deceased, empowering John D. Sullivan

to make, sign, execute and deliver all papers necessary and proper, and make all entries and do all things necessary for acquiring title in fee simple for us and each of us to all lands situated in the Territory of Oklahoma on which our brother Timothy B. Sullivan had any interest or claim upon whatsoever, and in which we, as heirs at law of said Timothy B. Sullivan, now deceased, have an interest and claim to, and to make and file in the proper land office . . . all entries, papers, etc., . . . for perfecting the title for us as such heirs . . . in proportion to the interests to which we are entitled as such heirs, which is an undivided one-fifth for each of us, etc.

On October 27, 1896, Joseph S. McPeck filed his affidavit of contest against said entry (duly corroborated), which reads as follows:

In the U. S. Land Office at Guthrie, Oklahoma Territory.

SEPTEMBER 29, 1896.

Personally appeared before me ———, a notary public in and for the county of Morris, State of Kansas, Joseph S. McPeck of said county and State, who upon his oath deposes and says:

That he is well acquainted with the tract of land in the homestead entry of John D. Sullivan, which entry is numbered 12459, and was made in the above named land office on December 27, 1894, for lots 1 and 2, and the south half of the northeast quarter of section 6, in township 18 north, of range 3 west, in Logan county, Territory of Oklahoma;

That he knows the present condition of said land, and that the said homestead entry was made by John D. Sullivan for himself and other heirs of Tim B. Sullivan, deceased, under the act of Congress approved July 22, 1892;

That the said John D. Sullivan is not at present and has not at any time since making said entry established his residence upon said land, and that none of the heirs of said Tim B. Sullivan ever resided upon said land and are not now residing thereon;

That the said Tim B. Sullivan never resided upon said land, and that the said John D. Sullivan and other heirs of said Tim B. Sullivan succeed to the interest of said Tim B. Sullivan as a result of a contest of said Tim B. Sullivan against a former homestead entry of one George S. McPeck, which said contest resulted in giving said Tim B. Sullivan a preference right to make homestead entry upon said land after the cancellation of the homestead entry theretofore made thereon by the said George S. McPeck;

That the said John D. Sullivan and other heirs of the said Tim B. Sullivan have wholly abandoned said tract and forfeited their rights therein by reason of their failure to establish a residence thereon within six months after the homestead entry of said John D. Sullivan was made;

I believe that said abandonment still exists at this date and has continued for a period of more than six months next prior to the date herein;

That said tract is not settled upon and resided upon by said John D. Sullivan or any of the heirs of the said Tim B. Sullivan as required by law, and this the said Joseph S. McPeck is ready to apportion at such time and place as may be named by the register and receiver for the hearing in this case; and he therefore asks to be allowed to prove said allegations and that said homestead entry No. 12459 may be declared canceled and forfeited to the U. S., he, the said Joseph S. McPeck, contestant, paying the expenses of such hearing.

Service was had by publication, and January 11, 1897, was fixed for the day of hearing. Upon that day the entryman, through his attor-

neys, moved to dismiss the complaint because it failed to state a cause of action.

The register and receiver sustained the motion and dismissed the contest. On appeal, your office, by decision dated March 23, 1897, affirmed that action, and a further appeal brings the case here.

He alleges the following grounds of error:

1. In deciding that residence on the land entered by John D. Sullivan is not required of him or any of the other heirs of the said Timothy B. Sullivan.

2. Error in holding that the entry made by John D. Sullivan was made for and on account of all the heirs of said Timothy B. Sullivan.

3. In holding that the heirs of Timothy B. Sullivan, all of whom are now residents of Oklahoma Territory, could lawfully make entry of said land and hold it as a homestead without any of them ever actually occupying the same as a homestead or residing thereon.

4. That said decision contravenes the spirit and purpose of the homestead law, and is therefore contrary to law.

The act of July 26, 1892 (27 Stat., 270), amends the act of May 14, 1880 (21 Stat., 141), and provides:

That should any such person, who has initiated a contest, die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been, if his death had not occurred.

Prior to the passage of this act, the death of a contestant as between the parties abated the contest. *Rasmussen v. Rice*, 6 L. D., 755.

As to the second ground of error but little need be said. John D. Sullivan in making the entry used form 4-063, and in doing so made unnecessary statements, such being used by persons generally who make entries "to obtain a home for myself," and for the purpose of "actual settlement and cultivation," and "not acting as agent of any person, corporation . . . nor in collusion with any person, corporation, &c., to give them the benefit of the land." The form used caused him to make erroneous statements of fact; but, accompanied by the power of attorney above alluded to, no deception was practiced, and the register's receipt shows that the entry was made in pursuance of the act of May 14, 1880, as amended by the act of July 26, 1892 (*supra*).

Moreover, the contest affidavit states that the entry was made by John D. Sullivan, "for himself and other heirs of Tim B. Sullivan, deceased, under the act of Congress approved July 22, 1892." Appellant will not in his appeal be permitted to deny what he stated under oath in his contest affidavit.

Specifications 1 and 2 are the same in substance, each alleging error in holding that it was not necessary for the entryman or any of the heirs for whom the entry was made to actually occupy the land as a homestead.

While the widow or heirs are required to cultivate and improve the land entered by a deceased homesteader, they are not required to reside on the land. *Agnew v. Morton*, 13 L. D., 228.

Nor will a charge of abandonment lie where it is shown that the entryman died within less than six months after making entry and prior to the establishment of residence, if it be shown that the heirs thereafter cultivated and improved the land. *Swanson v. Wisely's heir*, 9 L. D., 31; *Tauer v. The Heirs of Walter A. Mann*, 4 L. D., 433.

But it is insisted in the argument that the heirs are entitled only to the same rights under the act of 1892 (*supra*) that contestant would have been if his death had not occurred, and that this right can not be separated from the obligations which the entry imposes; that among these obligations residence on the land is required.

It is also insisted that the entry should have been made in the name of all the heirs; and that the entry made for the heirs generally exhausts their rights individually to make any further entry.

The question as to whether the entry made in behalf of the heirs exhausts the rights of the heirs individually to make another entry is not involved in this case. Should any of the heirs hereafter apply to enter lands, it will then be a proper subject of inquiry.

It is held in the case of *Bernier v. Bernier*, 147 U. S., 244, that:

If there are adults as well as minor heirs, the conditions under which such claim will be perfected and patent issued are different from the conditions required where there are only minor heirs and both parents are deceased. In the one case the proof is to extend to that of residence upon the property, or its cultivation for the term of five years, and show that no part of the land has been alienated except in the instances specified, and the applicant's citizenship and loyalty to the government of the United States; but in the other case, where there are no adult heirs and only minor heirs, and both parents are deceased, the requirements exacted in the first case are omitted, and a sale of the land within two years after the death of the surviving parent is authorized for the benefit of the infants.

The decision just quoted deals with the rights and obligations of minor and adult heirs in their inheritance of lands (under sections 2291 and 2292 of the Revised Statutes), upon which an entry has been made, when the entryman and his widow are both dead. In such case, either residence on or cultivation of the land may be shown as a part of the requirements when the adult heirs make final proof.

The act of 1892 (*supra*) casts upon the heirs of a deceased contestant (if citizens, etc.), the same right to enter the land upon the cancellation of the former entry as a result of a contest commenced by the deceased. Thereafter, the obligations imposed upon such heirs are no greater than those which are cast upon the heirs of a deceased homesteader; and in the latter case cultivation of the land for the required period, without actual residence thereon, is held to be sufficient.

It was not improper to allow one of the heirs to make entry of the land and in behalf of all the heirs.

The decision appealed from is affirmed.

ADAMS ET AL. v. QUIJADA ET AL.

Motion for review of departmental decision of July 12, 1897, 25 L. D., 24, denied by Acting Secretary Davis, September 22, 1897.

FINAL PROOF—RULE 53—FEES—OKLAHOMA LANDS.

McCALLA v. ACKER.

In the case of final proof taken during the pendency of a contest, under rule 53 of practice, the local office has no jurisdiction except to file said proof for action when the contest is finally closed. Where such proof is taken before some officer other than the register and receiver said officers are entitled to no fees until final action by them on said proof.

The sufficiency of final proof taken under said rule, or the right of the entry man to withdraw the same, should not be considered until final disposition of the pending contest.

A settler on Oklahoma lands is not disqualified by starting into the race from the hundred foot strip on the Chilocco Indian school reservation.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) *September 22, 1897.* (C. J. W.)

On October 5, 1893, Calvin S. Acker made homestead entry, No. 1600, for the SE. $\frac{1}{4}$ of Sec. 9, T. 27 N., R. 2 E., I. M., at Perry, Oklahoma.

On October 10, 1893, John S. McCalla filed affidavit of contest against the entry, alleging, in substance, prior settlement; and on June 6, 1893, he filed an amended affidavit, in which his allegation of prior settlement was made more specific, and in which it was charged, that defendant illegally entered the Cherokee Outlet from the Chilocco Indian school reservation, on the day of the opening.

On July 16, 1894, a hearing was had, and on April 17, 1895, the local officers rendered a decision in favor of defendant, from which the plaintiff appealed.

On March 25, 1895, Acker filed his application to make final proof before Virgil H. Brown, probate judge at Newkirk, Oklahoma, on May 10, 1895, notice of which was ordered published by the local officers, on March 29, 1895.

On the day named Acker and his witnesses appeared before the probate judge, and their testimony was taken.

On the same day McCalla filed a protest against allowing and approving the final proof on account of the pending contest, and charging Acker's disqualification.

McCalla claimed the right to cross-examine Acker and his witnesses, who submitted to such cross-examination, and McCalla submitted additional testimony. The testimony and protest were forwarded to the local office, and, on May 15, 1895, the local officers rejected the protest because McCalla refused to tender the fees to which said officers are entitled, for examining and approving such testimony. On May 25, 1895, McCalla filed in the local office a protest against paying said fees.

On July 26, Acker filed in the local office a paper in which it is stated that, after final proof was taken, it was withdrawn, and he asks to withdraw and dismiss the same. These papers were forwarded by the local officers to your office, without further action, and they were considered by your office together with the appeal of the plaintiff from the decision of the local officers, in the decision rendered on February 13, 1896. Said decision affirms the decision of the local officers, and dismisses the final proof of Acker, and the protests of McCalla.

The case comes before the Department on further appeal of plaintiff from your office decision. The errors alleged to have been committed are as follows:

1. Said decision is contrary to law, and the rules and decisions of the Interior Department.

2. The findings of fact are contrary to, and not supported by the weight of the evidence.

3. The Hon. Commissioner erred in finding that Acker ever established or maintained any bona fide residence on the land involved.

4. The Commissioner erred in not finding that Acker was not qualified to make entry for land in the Cherokee Outlet, by reason of his having obtained an undue advantage, and being at the hour of opening to settlement, within the boundary of the land declared open to legal settlement south of the south line of the Chilocco Indian school reservation.

5. The Hon. Commissioner erred in dismissing the final proof of Acker and McCalla's protest and proof against the same.

6. The Hon. Commissioner erred in not finding that McCalla is the only settler on the land involved, who has following (followed) up his initial acts of settlement by the establishment and maintenance of residence thereon; that he is the prior settler; that his rights to said land are superior to those of the defendant; and that the defendant in offering final proof in the face of an adverse claim of prior settlement on the land, is bound thereby, and will not be allowed to withdraw the same.

7. The Hon. Commissioner erred in dismissing McCalla's contest and in not canceling Acker's homestead entry, and allowing contestant McCalla to make entry for the land involved.

Neither the decision of the local officers nor the appeal of plaintiff therefrom involved any question connected with defendant's commutation final proof, offered long after the hearing on the contest proceedings had closed before the local officers. The final proof of Acker was, therefore, offered pending the contest, and the local officers, under amended rule 53 of practice, had no jurisdiction to do more than file said final proof for action after the contest was finally closed. (14 L. D., 250.) The local officers seem to be entitled to no fees, except those for reducing the testimony to writing in this class of cases, until the proof is finally passed upon, which can only be done after the contest has closed and the validity of the entry been passed upon. Where the proof is taken before some competent officer other than the register and receiver, these officers are entitled to no fees until final action on the proof. It follows that it was error to dismiss McCalla's protest because of his failure to pay the fees in advance. Neither the sufficiency of the final proof nor the right of defendant to withdraw it, should be passed upon pending the contest, and your office erred in allowing the withdrawal

of said proof and the dismissal of the protest, and so much of your office decision as refers thereto is reversed, and said proof and protest will be held to await the final disposition of the contest, when they will be returned to the local office for appropriate action. This leaves the case to be determined on the record as made at the hearing of the contest.

The claim of the plaintiff is based on the following statement of facts, as reported by the local officers:

That at 12 o'clock, noon, September 16, 1893, he entered the Cherokee Outlet from a point about a quarter to one-half mile west of the west side of the Chillico Indian school reservation upon the north line of the Cherokee Outlet;

That he rode south and southeast for a distance of about six miles and then rode to the quarter section in controversy and first stopped at the southwest corner of the same, or upon the southwestern portion of the tract; stuck a flag thereon; on the same afternoon laid a foundation of rocks near the southeast corner of the tract and left, going to the town of Cross; returned to the tract on Monday, September 18, drove over it; returned again on September 19, and plowed a small patch of land, returned the next day; laid off a land for plowing and on the following Monday, September 25th, returned to said tract and commenced plowing, continuing to plow at different times until about the 7th or 8th of October, during this time camping upon another tract of land;

On October 7, he sowed a small patch of wheat and during that time camped several nights on the claim; he left the tract on October 9th, returned on the morning of the 12th of October, and remained on the tract, or in the vicinity of the tract, until about November 4th, when he returned to his home at Cedarvale, Kansas;

February 18th, 1894, he returned to this tract, but did no work thereon, and moved on the land March 14, with his family, since which time he has resided on the tract.

The contestee bases his claim to said tract upon the fact that at 12 o'clock, noon, central standard time, September 16, 1893, he was at the south side of the Chillico Indian school reservation at the northeast corner of section 33, directly north of the east side of the tract in controversy;

That he rode directly to the tract in controversy; dismounted stuck a stake consisting of a fishing-pole composed of three joints, to which was attached a piece of flannel cloth about 2 feet wide and 2½ feet long, in the center of which was a piece of white cotton cloth about 8 inches square marked with his name;

That he remained upon the tract looking the claim over and riding over the same, and that he met the contestant when he came upon the land, or shortly thereafter;

That he spaded up some dirt and placed the same around the flag; returned to Arkansas City, and came to the land office at Perry, and returned to the claim on Tuesday, September 19;

That in the meantime he had had plowed on the northeast corner of the tract some land, and a sod foundation erected, on which was placed four pieces of lumber nailed together and marked with his name;

That he slept on the land September 20th and September 21st; slept upon the tract the night of September 21st; made entry of it on October 5th; on October 9th, sent lumber to the tract and on October 12th erected a house thereon;

On October 20th fenced the entire tract; was upon the claim frequently until December 13th, at which time his wife died; prior to that time she being seriously ill all of the time after he made settlement upon this tract of land;

His improvements at the time of trial are of the value of six to eight hundred dollars and his good faith, as shown by his acts, is apparent;

It is further shown that the horse ridden by contestee was a horse of more than ordinary qualities as to speed and endurance; that the distance he traveled in running to this tract was 8½ miles and that he first made settlement upon the northeastern portion thereof; and it is also shown that the horse ridden by the contestant was

not an extraordinary horse and that the distance he traveled, as detailed by him, is in the neighborhood of 15 miles, the same being something over twelve miles by section lines, provided he had not deviated from a direct course;

Both these parties claim prior settlement and both claim to have been first upon the tract. Considering the distance traveled and the quality of the horses, in our minds there can be no doubt that the contestee, Acker, was first upon the tract and the first party to stake and claim the same after 12 o'clock, noon.

The contestant, McCalla, seeks to claim that he traveled the distance of about 15 miles in from 30 to 33 minutes, which statement in itself we believe to be unreasonable; but aside from this question, whatever acts McCalla did upon this claim, were, in our opinion, abandoned by his failure to establish his residence thereon until March, 1894.

It will thus be seen that the local officers found Acker to have been the first settler, and further that McCalla had abandoned his first settlement. Your office concurred with the local office in finding that Acker was the prior settler, but properly, I think, held that McCalla had not abandoned his settlement.

Your office reports the following facts as to Acker's settlement:

Acker testified that he started in the race from within the one hundred foot strip south of the Chilocco school reservation at 12 o'clock, noon, September 16, 1893, and after traveling about eight and one-half miles reached the land at 12.27 P. M. Immediately afterwards he stuck a stake with a flag on it and in a short time stuck another stake. Remained until evening, when he went to Arkansas City and from there to Perry. Returned September 19, 1893, but in the meantime a man he had employed did some plowing and put up a foundation. Was on the land September 20 and 21 and the last night slept there. His wife was at a hotel in Arkansas City very ill with consumption and he went back and remained with her until October 1, 1893, when he went to Perry and made his entry October 5, 1893. Returned October 6, 1893. Bought some lumber October 9, 1893, and built his house three days afterwards, into which he moved the latter part of the month. October 25, 1893, he fenced the land.

During the latter part of November and early part of December, 1893, he was not on the land very often, on account of the continuous illness of his wife, who died December 13, 1893, but after December 18, 1893, until February, 1894, he was frequently on the land and had some plowing done. In March, 1894, had more plowing done, and has now sixty-five acres plowed, about twenty acres of which is in corn, and about the middle of the same month moved his house to another part of the land and built an addition. Dug a well forty-six feet deep, built a stable for four horses and a carriage, planted fifteen or twenty trees and built a division fence through the middle of the land. This is (was) his home as it is today. He is a physician and has a practice extending over a large area, which requires a great deal of attention and keeps him from home for days at a time. On cross-examination he names only two nights he was on the land after December 18, 1893, and during the remainder of that month. During January, 1894, was on the land as much of the time as he was not away on professional business. Was on the land possibly six nights in February, 1894. Had had a tenant in his home since the middle of March, 1894. Has a cot, table, chairs and bedding in the house and when there sleeps on the cot. Before September 16, 1893, was living and had an office in Arkansas City, and has an office there now.

The evidence shows that Acker was the first to reach and stake the claim on September 16, 1893, otherwise it is not shown that there was any material difference in the diligence used by the parties in making valuable improvements and establishing residence on the land.

The fact that Acker started in the race from a point on the one hundred foot strip south of the Chilocco school reservation did not disqualify him from making entry for the land. *Welch v. Butler*, 21 L. D., 369.

The record has been examined, and it furnishes abundant support for the conclusion reached both by your office and the local officers on the question as to which one of the parties reached the land first. The evidence is conclusive that Acker was the prior settler. It was properly held that Acker was not disqualified, by reason of having started into the race from the hundred foot strip on Chilocco Indian school reservation. *Brady et al. v. Williams* (23 L. D. 533).

Your office decision is modified to conform hereto.

CONTEST—PREFERENCE RIGHT—SETTLEMENT CLAIM.

MILLER v. VALLEY.

The preferred right of a successful contestant can not be defeated by the prior settlement of a third party who fails to assert his claim in the contest proceedings.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) *September 23, 1897.* (P. J. C.)

The appeal of Shedrick Miller from your office decision of November 14, 1896, dismissing his application to contest the homestead entry of Francis Valley for lots 2, 3, 4 and 5 of section 13; all of section 14 and and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of section 45, township 10 south, range 3 east, S. E. Dist. E. of R., New Orleans, La., land district, has been considered.

It appears that Francis Valley contested the former homestead entry made September 15, 1892, of one Felix Blunt on said tract whose entry was finally canceled as a result of this contest, on May 9, 1896, and on May 14, following, Valley made homestead entry of the tract.

It is stated in your said office letter that:

By letter "H," of May 19, 1896, addressed to your office, it was held, in the matter of an application of Shedrick Miller to intervene in the case of Valley v. Blunt "that if Miller desired to intervene he should have filed his application before or at the time of the hearing and not after Valley had sustained his charges and became entitled to a judgment on the merits, no appeal having been taken from the decision of your office recommending the cancellation of Blunt's entry;" and said application to intervene was accordingly denied.

On August 3, 1896, Miller filed an affidavit of contest against Valley's entry, alleging that he—Miller—had settled upon said tract "during the year 1892," and had continued to reside upon and cultivate the same; that as an actual settler he had a preference right of entry of said tract after the cancellation of Blunt's entry, and that Valley made entry "in bad faith with full knowledge of affiant's superior rights."

On August 4, 1896, the receiver rejected said application on the
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ground that he had lost whatever right he had to the land by reason of his failure to contest Blunt's entry, or by not entering the land prior to Blunt's entry. Notwithstanding this action of the receiver, the register on August 7, following, issued notice of the hearing which was served on Valley and the hearing set for September 21, 1896. On September 15, Valley appealed from the action of the register, and on the day set for the hearing, Miller moved to dismiss the appeal. This motion was sustained. On October 8, 1896, the local officers transmitted the entire record for consideration by your office where it was held that in view of the differing opinions of the local officers in respect to the action to be taken it was deemed proper to consider the case, and decided that:

Miller bases his claim to the land upon his settlement while the land was covered by Blunt's entry.

As Miller's rights as a settler attached only on the cancellation of Blunt's entry and such settlement rights were subject to Valley's preference right by virtue of the successful termination of his, Valley's, contest, the action of the register in ordering a hearing was erroneous, no cause of action being stated.

Whereupon Miller prosecutes this appeal.

In view of the conditions as stated by your office and conceded by appellant, there is no error in your office decision. Miller has had abundant opportunity to protect whatever rights he may have acquired by reason of his settlement. He alleges that he settled on the land "during the year 1892." Blunt's entry was made in September of that year, and Valley's contest was not filed till October 7, 1895, more than three years after Blunt's entry. Miller did not seek to intervene in the contest until "after Valley had sustained his charges and became entitled to a judgment on the merits." He is not therefore in a position to now attack Valley's entry on the ground of prior settlement.

But aside from this the act of May 14, 1880, (21 Stat., 140) gives a preference right of entry to the successful contestant and this right cannot be defeated by the prior settlement of a third party, especially where, as in the case at bar, the alleged prior settler has had the opportunity to present his claim in the contest proceedings.

Your office judgment is therefore affirmed.

ALASKAN LANDS—RIGHT OF WAY.

WILLIAM R. WEEKS.

The provisions of the general right of way act of March 3, 1875, are not applicable to lands in the District of Alaska.

Secretary Bliss to Mr. William R. Weeks, Newark, New Jersey, September 9, 1897. (W. V. D.) (F. W. C.)

I am in receipt, through reference from the Commissioner of Railroads, of your letter of August 25th last, making inquiry as to whether

the general right of way act of March 3, 1875 (18 Stat., 482), applies to the District of Alaska, and in reply thereto I have to state that in my opinion said act does not so apply.

The act of May 17, 1884 (23 Stat., 24), entitled "An Act providing a civil government for Alaska," contains the first provisions of law for the acquirement of title to lands within that District, aside from certain existing rights which were recognized by the treaty of cession in 1867 (15 Stat., 539). By the 8th section of the act of 1884, the District of Alaska was created a land district, and the laws of the United States relating to mining claims were declared to be in full force and effect from the date of the act, but the section provides that "nothing contained in this act shall be construed to put in force in said district the general land laws of the United States."

By the act of March 3, 1891 (26 Stat., 1095), sections 11 to 15, provision was made for the entry of lands in the District of Alaska for town-site purposes, and for the purchase of not exceeding one hundred and sixty acres then or thereafter occupied for the purpose of trade or manufacture. This is all of the legislation providing a means for the acquirement of a right in the land within the district of Alaska.

The right of way act of March 3, 1875, is a part of the general land laws of the United States, the operation of which has never been extended to the District of Alaska, and it is clear from the portion of the 8th section of the act of 1884, before quoted, it was the intention of Congress that no other means of acquiring a right to use or occupy the lands within the District of Alaska should be construed to apply than those specifically named.

This exclusion was evidently inserted to prevent any possible doubt, and clearly evidences an intent that the land laws should be applied to the District of Alaska from time to time by Congress in the exercise of its authority and discretion.

It follows that the provisions of the act of March 3, 1875, *supra*, do not now apply to the District of Alaska.

For your general information, I enclose you a copy of the circular concerning the right of way granted by the act of March 3, 1875.

DOYLE v. BENDER.

Motion for rehearing in the cause above entitled, see 24 L. D., 535, and 25 L. D., denied by Acting Secretary Davis, September 27, 1897.

PRACTICE—MOTION FOR RE-REVIEW.

DORN *v.* ELLINGSON.

Petitions or motions for re-review should not be filed in the General Land Office, but should be addressed to the Secretary of the Interior, in the form of an application for the exercise of his supervisory authority, on grounds not covered in the former consideration of the case.

Acting Secretary Davis to the Commissioner of the General Land Office,
(F. L. C.) September 27, 1897. (E. M. R.)

On September 11, 1897, you transmitted to the Department a petition for re-review, filed by Elling H. Ellingson, of departmental decision of February 13, 1897, in the case of Dorn *v.* Ellingson (24 L. D., 163). The record shows that on September 2, 1897, a motion for review of this decision was denied (25 L. D., 203).

On September 9, 1897, your office returned to the attorney of the said Ellingson the said petition for re-review, on the ground that it should have been filed in the Department. On September 10th, the said attorney re-filed said petition, which, as has been stated, was forwarded to the Department on the following day.

On August 9, 1893 (17 L. D., 194), Rule 114 was amended by adding as follows:

Motions for re-review, or a second reconsideration of a decision, shall not be received or filed. But the defeated party, if able, may invite the attention of the Secretary, by a duly verified petition, to important matters of fact or law not theretofore discussed or involved in the case; who, upon consideration thereof, will either recall the case, or send the petition to the files without further action.

This rule was again amended on June 1, 1894 (18 L. D., 472), and again on October 24, 1896 (23 L. D., 406), such amendment being made without any reference to the clause heretofore quoted.

In the case of Neff *v.* Cowhick (8 L. D., 111), upon this question of the proper place to file a petition for re-review, it was determined that motions for re-review should not be allowed, and that the practice of permitting them to be filed should be discontinued. It was further held that when a case had been decided upon review, if there was any new question of law or fact that hitherto had not been presented for the consideration of the Department, a petition calling attention to such matters might be submitted for such action as would be deemed appropriate by the Department. It was stated in said opinion:

Motions for a re-review, or a second reconsideration of a decision, should not be allowed, and the practice of permitting them to be filed ought to be discontinued. The Department ought not to be asked to consider the same points involved in a case but twice. It is natural to litigants, and occasionally happens to counsel, to see with an exaggerated estimate of their strength the importance of the points which make in their favor and to attribute the failure of a like perception of them to the Department, or by courts, when the causes are depending in courts, to an inattention to such points. The over-burdened condition of the appellate business of the

Department would be reason enough, if there were not still better ones for inhibiting the gratification of this feeling by allowing second motions for reconsideration, with the consequent labor and delay. Hereafter, let the rule be that no motion for a re-review shall be filed. If the defeated party is able to present any suggestions of fact or points of law not previously discussed or involved in the case, it may be done by petition, which shall contain all the facts and arguments. On the filing of such petition, if it appears important, the Secretary will make such order for recalling the case from the General Land Office and such direction for further hearing as may be necessary. Otherwise, no further action on the petition will be taken. It will be regarded merely as in the nature of information by which the supervisory jurisdiction of the Department can, if desirable, be set in motion. Such petition should not re-argue points already twice passed upon, but should be limited to the office indicated, of suggesting new facts or considerations not before presented.

In the more recent case of *Standley v. Jones* (19 L. D., 104), in which the case *supra* was quoted with approval, it was determined that such a motion or petition should not be filed in the General Land Office, but should be addressed to the Department.

The position of counsel upon this question seems to be that the said decision of *Standley v. Jones* was upon the original rule of practice as amended on August 19, 1893, and therefore is not of binding force and authority, because it did not consider the rule as since amended. This position is not well taken, for in the case of *Golden v. Cole's Heirs* (25 L. D., 154), on August 27, 1897, it was said:

After the case was considered here, on the appeal of *Golden*, and on his motion for review, both of which were decided adversely to him, he had exhausted his rights under the Rules of Practice, and the case was closed. Notwithstanding this, he filed in your office a petition for rehearing, which was transmitted here. As Rule of Practice 114 provides that "motions for review and motions for rehearing" must be filed "within thirty days after notice of the decision complained of," *Golden's* application for rehearing, being filed more than thirty days after notice of the decision in the contest case, was manifestly out of time, and could only be received as an appeal to the supervisory power of the Secretary. This being so, it should have been made by a petition direct to the Secretary, filed here and not in your office, and therefore might properly have been returned by you, under the rulings in *Standley v. Jones* (19 L. D., 104).

It is thus seen that the voice of the authorities is to the effect that motions for re-review are without standing, and that this rule has obtained since, if not before the decision in 8 L. D., *supra*.

Hereafter you will see that this rule is strictly enforced, and refuse to receive for filing such motions, and will return them to the party submitting them to be filed.

When viewed from the standpoint of a petition to the supervisory power with which I am clothed, it seems to be sufficient to say, that this motion re-argues the very questions that have been considered in both of the decisions of this Department. The question at issue was whether the "Sargent list", including among other tracts the tract in controversy, served to except this land from the grant to the railroad company, the McGregor and Missouri River Railroad Company, under the act of May 12, 1864 (13 Stat., 72), and its successor in interest the Chicago, Milwaukee and St. Paul Railroad Company.

HALL v. MITCHELL.

PRACTICE—NOTICE OF DECISION—ATTORNEY.

Your office letter says that on April 27, 1897, the local officers were

directed to notify all parties in interest of said departmental decision, and they were also advised that resident attorneys for the parties in interest had been notified by your office.

On July 29, 1897, your office called upon the local officers for report in the case, and on August 2, 1897, the register responded by stating that the decision had been noted upon their books, but that they had not notified the parties in interest, in view of the statement of your office that resident counsel had been notified. Thereupon the case was by your office closed, and the judgment made final.

There was nothing of record to indicate that the services of the attorneys of these parties were to cease with the rendering of the decision of the Department. In the recent case of *Walker v. Gwin* (25 L. D., 34), aside from laying down the general proposition that service of notice of a decision upon the attorney of record is service upon the party himself, which is a rule of well recognized authority, it was held, upon a somewhat similar question to the one at bar (*inter alia*), that (syllabus):

Where a party is represented by two attorneys of record, and one of said attorneys accepts service of a notice of decision, such party will not be heard to plead a private understanding between himself and his attorneys under which all notices were to be served on the other attorney.

And in discussing it, on page 36, it was said:

The local officers were not notified of any limitation upon Hudson's attorneyship, nor that his attorneyship had ceased prior to the said acceptance. A party can not, based merely upon an alleged private understanding between himself and one, or even both, of his attorneys of record, limit the ordinary functions of one of them so as to avail himself of all the advantageous consequences of the relation of client and attorney, and, also, solely at his own election, avoid the consequences of that relation when they are adverse to him, to the prejudice of the rights of his adversary. Service of notice was evidently made in good faith upon Hudson and so accepted by him. So far as the record discloses, he was then still Walker's attorney, and the acceptance within the scope of his authority.

By a parity of reasoning, there was nothing of record to show that the attorneys in this case had ceased such relationship with their client. It came within the ordinary scope of their authority as such attorneys, and the presumption upon which your office had a right to act was that they were still the attorneys of these petitioners, and therefore could rightfully be served.

The application to have notice sent to the local office is therefore denied.

ROSCOE ET AL. v. FOSTER ET AL.

Motion for review of departmental decision of May 13, 1897, 24 L. D., 435, and for a rehearing in said case, denied by Secretary Bliss, September 30, 1897.

ADJOINING FARM ENTRY—RESIDENCE—WIDOW.

BABCOCK v. SUGDEN.

Where an entryman, who has made an adjoining farm entry, dies more than six months after entry without having established residence on the original farm, his widow may cure said default by the establishment of such residence prior to the initiation of any adverse claim.

Secretary Bliss to the Commissioner of the General Land Office, October 1, 1897. (F. L. C.) (J. L. McC.)

On December 16, 1892, George Sugden made homestead entry No. 9639, for the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 22, T. 5 N., R. 11 E., as an adjoining farm homestead to the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SW $\frac{1}{4}$ of the NE $\frac{1}{4}$ of the same section, Grayling land district, Michigan.

(In his declaration of intention to become a citizen of the United States his name is written "Sugneden," and signed by his mark; in his entry papers it is written "Sudnedn," and signed by his mark; but from explanations embodied in the record it is clear that his name is properly written "Sugden.")

On March 13, 1894, one Samuel Babcock was allowed to make homestead entry No. 2758 for the tract above described as being embraced in Sugden's adjoining farm homestead entry. When Babcock's entry papers were received by your office the fact of the conflict between his claim and Sugden's became apparent; thereupon, by your office letter of May 15, 1894, Babcock's entry was suspended and he was notified that thirty days would be allowed him in which to show cause why his entry should not be canceled.

From this action Babcock appealed to the Department, which, on October 1, 1895, directed:

That Babcock be given sixty days within which to initiate a contest against the prior entryman, his entry to remain suspended pending action on such contest if brought; and in case he failed to contest within the time allowed, his entry will be canceled.

Babcock initiated contest. George Sugden having deceased, service was had upon his widow, Betsy Sugden. Both parties appeared and offered testimony before Commissioner A. J. Bickford, at Leonard, Michigan, on May 12, 1896. On May 27, the local officers rendered joint decision that Sugden's homestead entry had "not been cultivated by the heirs of the deceased entryman as required by law." Mrs. Sugden appealed to your office, which, on March 30, 1897, found:

That George Sugden, from 1892 until the date of his death, April 8, 1895, lived with his family in an adjoining township, on a farm which he rented from a man named Killam; and that he did not reside on the farm he owned adjoining the forty acres in controversy, although he appears to have spent a few months thereon in one or more years, with tenants to whom he rented the land; that he cleared a small part of the tract; that within a couple of months after his death his widow removed to the farm adjoining the land in dispute, and had been residing there about one

year when served with notice of the contest. The evidence also shows that the widow has done some work in clearing this tract since she established her residence on the adjoining farm. There is no evidence that Babcock has made any settlement or improvements on said land. I am of the opinion that the widow, having shown compliance with the requirements of the homestead law for nearly one year prior to service of notice of this contest, cured the prior default and defeated this contest. *Heptner v. McCartney*, 11 L. D. : 400; *Neal v. Cooley*, 18 L. D., 3.

A careful examination of the testimony shows that the facts disclosed at the hearing have been correctly summed up in the decision of your office above quoted.

In each of the cases cited by your office decision, the entryman himself cured his laches by establishing residence upon the lands there in controversy prior to service of notice upon him; while in the case at bar the entryman died without establishing residence upon the land. The question in issue here is whether, after the death of the entryman, more than six months after entry, without having resided upon the tract originally owned, to which such "adjoining farm homestead" is contiguous, the establishment of residence by his widow after his death, but before the initiation of any adverse claim, should be considered as curing her husband's laches?

I concur in the affirmative conclusion expressed in your office decision appealed from. Babcock's contest is dismissed; and his entry, having been improperly allowed, during the existence of a prior entry, should be canceled. Your office decision is therefore affirmed.

TAYLOR ET AL. v. EWART.

Motion for review of departmental decision of June 3, 1897, 24 L. D., 499, denied by Acting Secretary Davis, October 2, 1897.

DELAWARE INDIANS IN CHEROKEE NATION—ALLOTMENT.

OPINION.

Cherokee citizens of Delaware blood are entitled to the same quantity of land in allotment as are those of Cherokee blood, with the proviso that if it be found there is not sufficient land to give each member of the nation as much as one hundred and sixty acres in allotment, then the registered Delawares shall first be given the full quantity of one hundred and sixty acres, the remainder of the land to be divided equally among the other members of the nation.

First Assistant Attorney Campbell to the Secretary of the Interior, October 5, 1897. (W. C. P.)

Under date of August 19, 1897, the Commissioner of Indian Affairs made report upon the rights of the Delaware Indians, adopted citizens of the Cherokee Nation, and said report, with accompanying papers, has been referred to this office "for an opinion as to the quantity of land which the Delaware Indians are entitled to receive per capita in allotments in the Cherokee Nation."

By the treaty of July 19, 1866 (14 Stat., 799), between the United States and the Cherokee Nation, provision was made for the settlement of friendly Indians within the Cherokee country, upon such terms as might be agreed upon between such tribe and the Cherokees, subject to the approval of the President of the United States. On April 8, 1867, the Delaware and Cherokee Indians entered into an agreement for the settlement of the former in the country of the latter, by reason of which the Delawares moved into the Cherokee country.

In connection with the negotiations now pending between the United States and the Cherokee Indians, a question has arisen as to the quantity of land to which the Delaware Indians, as adopted citizens of the Cherokee Nation, will be entitled if such negotiations shall eventuate in a division per capita of the land now held as communal property of the nation.

The contention of the Delawares, as set forth in a communication from R. C. Adams and John Bullette, claiming to be delegates and representatives of the Delawares, and also by the report of the chairman of the commission to the Five Civilized Tribes, is that they are entitled to allotment of 157,600 acres of land, for which they paid the Cherokees one dollar per acre, and also to a further allotment of one hundred and sixty acres per capita. There is no statement among the papers before me as to the claims of the Cherokee Nation in the premises.

Article XV of the treaty of July 19, 1866, *supra*, between the United States and the Cherokee Nation, so far as it is necessary for the purposes of this case, reads as follows:

The United States may settle any civilized Indians, friendly with the Cherokees and adjacent tribes, within the Cherokee country, on unoccupied lands east of the ninety-sixth degree, on such terms as may be agreed upon by any such tribe and the Cherokees, subject to the approval of the President of the United States, which shall be consistent with the following provisions, viz: Should any such tribe or band of Indians settling in said country abandon their tribal organization, there being first paid into the Cherokee national fund a sum of money which shall sustain the same proportion to the then existing national fund that the number of Indians sustain to the whole number of Cherokees then residing in the Cherokee country, they shall be incorporated into and ever after remain a part of the Cherokee Nation, on equal terms in every respect with native citizens. And should any such tribe thus settling in said country, decide to preserve their tribal organizations, and to maintain their tribal laws, customs, and usages, not inconsistent with the constitution and laws of the Cherokee Nation, they shall have a district of country set off for their use by metes and bounds equal to 160 acres, if they should so decide, for each man, woman, and child of said tribe, and shall pay for the same into the national fund such price as may be agreed on by them and the Cherokee Nation, subject to the approval of the President of the United States, and in cases of disagreement the price to be fixed by the President.

That the possibility of future allotment of their land was contemplated, is shown by the provisions of Article XX, which reads as follows:

Whenever the Cherokee national council shall request it, the Secretary of the Interior shall cause the country reserved for the Cherokees to be surveyed and allotted among them, at the expense of the United States.

In the preamble to the agreement between these parties, it is recited that the treaty between the United States and the Cherokee Nation provided for the settlement of friendly Indians in the Cherokee country; that in a treaty between the United States and the Delaware Indians, ratified August 10, 1866, the removal of the Delawares to the Indian country was provided for, and also the sale to them of a tract of land the cession of which by the Cherokees to the United States was then contemplated; that such cession was not made, but in lieu thereof terms were provided for the settlement of friendly Indians in the Cherokee country; and that a conference had been held between the representatives of the Cherokees and the Delawares looking to a location of the Delawares upon the Cherokee lands and their consolidation with said Cherokee Nation.

The agreement, so far as it is necessary to quote therefrom for the present consideration, is as follows:

The Cherokees agree to sell to the Delawares, for their occupancy, a quantity of land east of the line of the 96° west longitude, in the aggregate equal to 160 acres of land for each individual of the Delaware tribe ; and the selections of the lands to be purchased by the Delawares may be made by said Delawares in any part of the Cherokee reservation east of said line of 96°, not already selected and in the possession of other parties; and in case the Cherokee lands shall hereafter be allotted among the members of said Nation, it is agreed that the aggregate amount of land herein provided for the Delawares, to include their improvements according to the legal subdivisions, when surveys are made (that is to say, 160 acres for each individual,) shall be guaranteed to each Delaware incorporated by these articles into the Cherokee Nation; nor shall the continued ownership and occupancy of said land by any Delaware so registered be interfered with in any manner whatever without his consent, but shall be subject to the same conditions and restrictions as are by the laws of the Cherokee Nation imposed upon the native citizens thereof; *provided*, that nothing herein shall confer the right to alienate, convey, or dispose of any such land, except in accordance with the constitution and laws of said Cherokee Nation.

It was then provided that there should be paid to the Cherokees from the Delaware fund a sum of money equal to one dollar per acre for said land, and further, that there should be paid a sum of money which should sustain the same proportion to the then existing Cherokee national fund that the number of Delawares removing to the Indian country should sustain to the whole number of Cherokees residing in the Cherokee Nation, and the agreement concluded with the following:

On the fulfillment by the Delawares of the foregoing stipulations, all the members of the tribe, registered as above provided, shall become members of the Cherokee Nation, with the same rights and immunities, and the same participation (and no other,) in the national funds, as native Cherokees, save as hereinbefore provided. And the children hereafter born of such Delawares so incorporated into the Cherokee Nation, shall in all respects be regarded as native Cherokees.

The Delawares moved into the Cherokee country as contemplated by this agreement. Afterwards dissensions arose over the division of funds arising from the sale of certain lands and from the leasing of others. By act of the Cherokee national council, the adopted citizens

were excluded from participation in the per capita distribution of these funds. By the act of Congress approved October 1, 1890 (26 Stat., 636), jurisdiction was conferred upon the Court of Claims, subject to an appeal to the Supreme Court, "to hear and determine what are the just rights in law or in equity" of these adopted Cherokee citizens. Suit was begun by the Delaware Indians, which resulted in a decree by the Court of Claims (28 Ct. Cls., 281) in favor of the complainants.

It was found that the Delaware Indians—

were admitted into and became a part of the Cherokee Nation entitled to equal rights and immunities and to participation in the Cherokee national funds and common property in the same manner and to the same extent as Cherokee citizens of Cherokee blood.

A judgment was rendered for the proportionate amount of the funds which had theretofore been distributed among the Cherokee citizens by blood, and further order was made as follows:

And it is further adjudged and decreed that the claimants in this suit and those whom they represent, being citizens of the Cherokee Nation, of Delaware blood or parentage, be adjudged and decreed to be entitled to participate hereafter in the common property of the Cherokee Nation in the same manner and to the same extent as Cherokee citizens of Cherokee blood or parentage may be entitled, and that in the distribution of the proceeds and avails of the public domain, or common property of the nation among the citizens thereof by distribution *per capita* at any time hereafter the defendants the Cherokee Nation and the defendants the United States, as trustees of the Cherokee Nation, be enjoined and prohibited from making any discrimination between Cherokee citizens of Cherokee blood or parentage and Cherokee citizens of Delaware blood or parentage to the injury or prejudice of the latter.

Upon appeal to the Supreme Court this decree was affirmed (*Cherokee Nation v. Journeyake*, 155 U. S., 196).

While the specific question as to the quantity of land to which Delaware-Cherokee citizens would be entitled when the public domain should be divided per capita, was not discussed in that decision, yet the discussion as to the rights generally of these citizens has a bearing upon the question now presented.

It is said by the Court of Claims that the lands of the Cherokees are held as a communal property, of which every member is an owner with the same rights therein as every other member. No member has any right of property therein which he can dispose of or which upon his death descends to his children as his heirs. It is further held that the agreement of 1867 was something more than a deed of bargain and sale. That is, it was a treaty by which the Delawares became a component part of the Cherokee Nation, with the same rights in every respect as the native citizens possessed.

The Supreme Court expressed the same views and said:

Given, therefore, the two propositions that the lands are the common property of the Cherokee Nation, and that the registered Delawares have become incorporated into the Cherokee Nation and are members and citizens thereof, it follows necessarily that they are equally with the native Cherokees the owners of and entitled to share in the profits and preceeds of these lands.

The court also pointed out that the fact that there might come a time when an allotment in severalty would be advisable, was contemplated and provided for, and as bearing upon the rights of the adopted citizens in the happening of that contingency, the following may be quoted:

So far as the provision in the agreement for the purchase of homes is concerned, it will be perceived that no absolute title to these homes was granted. We may take notice of the fact that the Cherokees in their long occupation of this reservation had generally secured homes for themselves; that the laws by the Cherokee Nation provided for the appropriation by the several Cherokees of lands for personal occupation, and that this purchase by the Delawares was with the view of securing to the individual Delawares the like homes; that the lands thus purchased and paid for still remained a part of the Cherokee reservation. And as a further consideration for the payment of this sum for the purchase of homes the Delawares were guaranteed not merely the continued occupancy thereof, but also that in case of a subsequent allotment in severalty of the entire body of lands among the members of the Cherokee Nation, they should receive an aggregate amount equal to that which they had purchased, and such a distribution as would secure to them the homes upon which they had settled, together with their improvements. So that if, when the allotment was made, there was for any reason not land enough to secure to each member of the Cherokee Nation 160 acres, the Delawares were to have at least that amount, and the deficiency would have to be borne by the native Cherokees *pro rata*. In other words, there was no purchase of a distinct body of lands, as in the case of the settlement of other tribes as tribes within the limits of the Cherokee reservation.

A careful consideration of this agreement in connection with the treaty between the United States and the Cherokee Indians, in the light of the discussions found in the respective decisions of the Court of Claims and the Supreme Court, shows that several propositions relative thereto must be accepted as beyond dispute. Among these the following may be mentioned: That the registered Delawares who removed to the Cherokee Country became members as individuals of the Cherokee Nation with the same rights as native citizens; that they did not individually or collectively acquire the title to any specific tract of land; that they did, however, as individuals have an interest in all the lands of the Cherokee Nation in common with all other citizens of that Nation; that this interest or right of property was the same as that of the native Cherokee citizens, with the added guarantee that they should, in case of allotment in severalty, receive not less than the specified quantity of 160 acres, to include their improvements; and that the children of these adopted citizens are citizens of the Cherokee Nation on exactly the same footing in every particular as citizens of Cherokee blood.

As to the descendants of those Delawares who became citizens by virtue of said agreement, there can be no question. They were born citizens of the Cherokee Nation and are entitled to share in the division of the public domain to the same extent and upon the same terms as citizens of Cherokee blood. They took no title, as heirs, in the lands occupied by their fathers, because the interest in these lands being a communal interest was not descendible.

It is claimed that those Delawares who moved into the Cherokee

country under said agreement, the registered Delawares as they are called, are each entitled to an allotment of 160 acres, because they purchased and paid for that quantity, and, in addition, to a distributive share of the remaining lands to be allotted, because they are citizens of the nation. In the suit before the courts it was claimed in behalf of the Cherokees that those Delawares were not entitled to any share of the lands of the Cherokee Nation beyond the quantity of 160 acres mentioned in the agreement. In support of this contention it was argued that the price paid was a grossly inadequate consideration for an interest in all the lands of the Cherokees. In discussing the question as to the price paid the Supreme Court used the following language:

Neither should too much weight be given to the fact that the Delawares were to pay for their homes at the rate of a dollar an acre, for by that purchase they acquired no title in fee simple, and it is not unreasonable to believe that the price thus fixed was not merely as compensation for the value of the lands, (to be taken in the eastern portion of the reservation, where the body of the Cherokees had their homes, and therefore probably the most valuable portion of the entire reservation,) but also as sufficient compensation for an interest in the entire body of lands, that interest being like that of the native Cherokees limited to a mere occupancy of the tracts set apart for homes, with the right to free use in common of the unoccupied portion of the reserve, and a right to share in any future allotment.

Again, in speaking of the question of allotment, the court said:

That there might come a time when an allotment in severalty would be advisable, was something that was contemplated and provided for. And while, if allotment had been made at the time among the 13,573 Cherokees there would have been enough land to have given each nearly 1,000 acres, yet, with the expected coming in of other tribes, either to take certain selected portions of the reservation as tribes by an absolute title, or to enlarge the numbers of the Cherokee Nation by adoption, (as in the case of these Delawares,) it was foreseen that the time might come when the allotment might not secure even 160 acres to each individual, and so was added the express guarantee that the purchasing Delawares should obtain at least that amount in the allotment.

In view of these declarations by the Supreme Court as to the meaning and effect of the agreement between these people, the contention that the registered Delawares are entitled to 160 acres each by right of purchase, and also to an allotment in the remaining lands, can not be sustained. As said by the Court of Claims, the agreement was something more than a contract for the sale and purchase of lands. It was in fact a compact for the consolidation of two separate and distinct bodies politic by which they became united in one. By its terms the Delawares, or that portion of that tribe which saw fit to accept the agreement, were merged in and became a component part of the body politic of the Cherokee Nation. It was the evident intention and effect of the compact to make the adopted members equal in all respects with the original members.

After a careful consideration I am of opinion and so advise you, that the Cherokee citizens of Delaware blood are entitled to the same quantity of land in allotment as are those of Cherokee blood, with the

proviso that if it be found there is not sufficient land to give each member of the Nation as much as 160 acres in allotment, then those Delawares who moved into the Cherokee country, known as registered Delawares, shall first be given the full quantity of 160 acres, the remainder of the land to be divided equally among the remaining members of the Nation.

Approved, October 5, 1897.

C. N. BLISS,

Secretary.

DESERT LAND CONTEST—RECLAMATION.

BERRY ET AL. v. BLUNT.

A charge of non-reclamation, within the statutory period, should not be entertained against a desert land entry, where it appears that the land has been reclaimed prior to the initiation of the contest.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 5, 1897. (J. L. McC.)

I have considered the case of William A. Berry and William D. McCracken v. Phineas U. Blunt, involving the desert land entry of the latter for the W. $\frac{1}{2}$ of Sec. 10, T. 26 S., R. 24 E., M. D. M., Visalia land district, California.

Said entry was made March 30, 1877; but on September 28, 1877, it was (with many others) suspended with a view to an investigation as to the character of the land.

On August 28, 1885, Chester M. Carter and William McCracken filed joint affidavit of contest against said entry, alleging in substance that he had not reclaimed the land, and that it was not desert in character.

On December 7, 1885, a hearing was had; the local officers rendered no decision, but transmitted the record thereof to your office.

The order of suspension (*supra*) was revoked by the Department on January 12, 1891, (see case of James B. Haggin, 12 L. D., 34) and direction given as follows (page 42):

The time between the date when said order of suspension became effective, and the date of the notice of its revocation, will be excluded from the time within which the entryman is required to make proof of his compliance with the requirements of the law.

In accordance with the decision and order above mentioned, your office, on February 10, 1891, revoked the order of suspension in the case of the entry here in controversy (with many others), and directed the local officers "to take appropriate action" therein.

A hearing was ordered for June 13, 1891, to determine what would be "appropriate action." The local officers, without taking testimony, dismissed the contest, because an examination of the affidavit of contest showed that it was

not properly corroborated, and that the facts therein stated, if admitted to be true, would not justify the cancellation of the entry.

The contestants appealed; whereupon your office, on April 26, 1892, affirmed the decision of the local officers.

The contestants appealed to the Department; which, on July 7, 1893, held that "the substantial merits of the case had been sacrificed to technicalities"; that the "appropriate action" that should have been taken by the local officers was "to have proceeded with the trial of the charges, with a view of ascertaining the character of the land at the date of the entry"; and directed "that course to be taken by the local officers at a hearing" to be thereafter ordered. (See 17 L. D., 96.)

In pursuance of the above decision your office ordered a hearing, which was held commencing August 19, and closing October 12, 1893.

On December 11, 1893, the local officers rendered a decision in favor of the entryman; which, on appeal was affirmed by your office on February 13, 1894.

On March 22 and 23, 1894, Blunt made final proof (as permitted by amended Rule of Practice No. 53). Said proof was transmitted to your office, together with additional affidavits, filed January 2, 1894, charging non-reclamation at that date; also a protest by McCracken, filed March 22, 1894, against the allowance of Blunt's proof, alleging that the time prescribed by law for making such proof had expired. Your office transmitted the entire record to the Department, with an appeal by the contestants from your office decision of February 13, 1894 (*supra*).

The Department, on July 6, 1895, found and held as follows (310 L. and R., 456):

The testimony is voluminous and very conflicting as to the character of the land in 1877; but a careful reading of it shows that the weight of the evidence sustains the opinion of the local officers and your decision that in 1877 the land was not capable of cultivation, and was what would be classed as desert land Within the time Blunt had to comply with the law, ditches were carried from the canal to the land, sufficient in number and volume to thoroughly irrigate the entire tract, as appears by his final proof—which was made after your office decision. That the tract was desert land in 1877, within the meaning of the law, was fully shown by the evidence at the hearing; and that the irrigation was successfully made in proper time appears by the final proof.

A motion for review was filed; and the Department on December 16, 1895, re-affirmed its prior decision except in so far as appears by the following extract from the decision denying the motion for review (321 L. and R., 403):

It follows that the final proof in this case was submitted within the statutory limit, and that the protests do not state sufficient grounds to authorize the hearing prayed for.

Inasmuch as the sufficiency of Blunt's final proof had not been passed upon by your office when the decision herein under review was rendered, it was unnecessary for the Department to pass upon the same, as was apparently done in said decision. The papers are herewith returned to your office, with directions to re-examine Blunt's proof of reclamation. If the same be found satisfactory, payment will be accepted, and certificate will issue.

Your office, in a letter dated June 13, 1896, to the local officers, in the matter of a special agent's adverse report (of April 11, 1894) concerning Blunt's entry, gave the following directions:

In view of the fact that the charge of the special agent as to the non-desert character of the land has been disposed of by the several decisions before mentioned, and that the entryman should not be called upon to defend a second time against the same charge (9 L. D., 217), no action on the agent's report is deemed necessary, and the entry is relieved from suspension; and the final proof having been examined and found satisfactory, you are directed to accept payment for the land and issue the final certificate.

Before the issuance of the above order, however, William A. Berry and William D. McCracken, on January 21, 1896, filed in the local office their joint affidavit of contest against Blunt's entry. Said affidavit charges that the final proof submitted by Blunt on March 22, and 23, 1894, was not made within the statutory period of three years from date of entry, exclusive of the period of suspension. The allegations set forth in detail the facts hereinbefore recited, setting forth, further, that Blunt's attorney, George C. Gorham, had actual notice in June, 1891, of the revocation of said suspension, and they contend that said notice was binding on Blunt; that therefore time began (again) to run against the entry from said date, and that his proof was not submitted within the time prescribed.

The local officers ordered a hearing, which was set for June 22, 1896. On that day Blunt made special appearance, by attorney, and moved that the contest be dismissed, upon the grounds, in substance:

That the matter was not within the jurisdiction of the local officers; that the complaint was not made until long after the proof of reclamation had been submitted, and was not in the nature of a charge of fraud or irregularity in the proof; that legal notice of the revocation of the suspension of the entry was not served upon the entryman until it was served by registered mail, on August 21, 1893, and that therefore the final proof was duly submitted; and that the charges now brought were fully heard and adjudicated in the case of Carter and McCracken v. Blunt.

The local officers denied the motion to dismiss, and the hearing proceeded. On September 10, 1896, the local officers rendered a decision, in which they say:

At the trial the material allegations of the complaint were substantially proved; and the only questions which need be considered are: (1) Has this office jurisdiction of the cause? (2) Did the claimant have notice of the revocation of the suspension of his entry in 1891? (3) If so, was he bound by that notice?

These several questions the local officers decided favorably to the contestant. Due notice was given to all parties in interest; but the defendant failed to appeal.

On receipt of the record of the case your office (apparently under Rule 48 of Practice) rendered a decision, of which the following is the conclusion:

While it is true that the question as to whether Blunt's final proof was made within the statutory limits was expressly decided in the entryman's favor by said

departmental decision, on review, of December 16, 1895, it is to be said that the conclusion of the Department in that regard (citing *Farnell v. Brown*, 21 L. D., 394), was based solely on the ground that legal notice of the revocation of said suspension was not served upon this claimant until August, 1893, when, as the record shows, it was given by registered mail. The fact that the record then showed Blunt's said attorney, Gorham, to have had actual notice of the revocation of the suspension in June, 1891, was neither urged by the said contestants, nor treated by the Department, as affecting said question.

The effect of said actual notice to Blunt in June, 1891, is now, for the first time, expressly raised by the contestants herein, and they virtually rest their case thereon. The consideration of such question at this time would manifestly, involve the collateral inquiry as to whether, under the terms of said departmental decision of December 16, 1895, the main issue here presented had become *res judicata*. These are both matters, however, which, in view of all the facts, are not essential to a proper determination of the case.

It is evident from the record facts hereinabove stated that contest proceedings were pending against this entry from the time such suspension was revoked on February 10, 1891, up to January 21, 1896, when notice was given of the final termination of the contest brought by Carter and McCracken. In fact, it will be seen that the initiation of the proceedings now under consideration on said January 21, 1896, brings the pendency of adverse proceedings down, without interruption, to the present time. It is a settled rule that a claimant, while not excused from compliance with law in other respects by the pendency of adverse proceedings, is yet not bound to submit proof in the presence of such proceedings, but may elect to wait a termination in his favor (*Gant v. Locke*, 17 L. D., 203). It follows that Blunt's said proof antedates the filings of this contest by nearly two years, and was not subject to subsequent attack except for fraud or irregularity, you should have dismissed the contest. For these reasons, your decision was clearly contrary to law and it is hereby accordingly reversed. Under the terms of said letter "P" of June 13, 1896, Blunt's proof stands approved and accepted by this office.

From the above decision of your office the contestants have appealed to the Department, alleging, in substance, that your office was in error in holding that the matters in contest were *res judicata*; in not holding that notice in 1891, to Blunt's counsel, Gorham, was notice to Blunt; in not holding that Blunt "did not reclaim the land in controversy within three years after he received notice that his entry was relieved from suspension;" in holding that the pendency of a contest was no excuse for non-compliance with the law; in not holding that the acts of July 26, and August 6, 1894 (28 Stat., 123, 226), could not aid the entryman, because the time within which he was required to reclaim the land had expired before the passage of either act; in not finding that the entryman's failure to appeal from the decision of the register and receiver forever barred him from subsequently asserting any right to the land; in not holding "that the entry of Blunt was made in the interest and for the benefit of the Kern County Land Company, a corporation whose capital is \$10,000,000."

Relative to the last allegation it may be said that no such charge appears in the contest affidavit of either Berry or McCracken, and it does not appear that any proof was taken tending to sustain such

allegation. Indeed, this would appear to be conceded by counsel for contestants, when he says in his argument:

If we may be permitted to follow counsel's example and go outside of the record, we might say that Mr. Blunt possibly cares but little whether he gets title or not; for in all probability he will, as soon as proof is made, do like nearly all other desert entrymen who located desert lands near his, viz: convey to the Kern County Land Company.

The remaining allegations of error need not be discussed *seriatim*. A perusal of them will show that they do not allege that Blunt had not reclaimed the land in controversy at the date of the filing of the contest affidavits of said Berry and McCracken (January 21, 1896), but that he did not reclaim it "within three years after he received notice that his entry was relieved from suspension." Whether or not notice to Gorham was notice to Blunt—whether or not Blunt reclaimed the land within the time prescribed by law—your office has found as a fact proved by the record and the testimony, and it is not denied by these contestants, that he reclaimed it long prior to the filing of these contest affidavits by Berry and McCracken; and any laches of which he may have been guilty was cured prior to their appearance in the case. The desert land act does not "contain any penalty or forfeiture clause covering a failure to properly reclaim the land." (*Miller v. Noble*, 3 L. D., 9). In the case of *Meads v. Geiger* (16 L. D., 366), the Department held (see syllabus):

The right of a desert land entryman, who fails to effect reclamation within the statutory period, to perfect his claim, is not defeated by the intervention of a contest, where from the first the entryman has shown the utmost diligence and good faith, and the default is due to a mistake which the entryman is engaged in rectifying when the contest is initiated.

(See also *Thompson v. Bartholet*, 18 L. D., 96; *Gage v. Atwater*, 21 L. D., 211). Much less can his right be defeated by the intervention of a contest when the entryman has already completed reclamation, prior to the initiation of contest. The contestants in the case at bar, however, allege that Blunt was negligent in effecting reclamation of the land embraced in his entry. If it were to be conceded that such was the case, the Department has held, in the contest case of *Miller v. Noble* (3 L. D., 9, syllabus):

Where the claimant was negligent in his reclamation, but the defect was cured before contest, the entry will not be disturbed.

In the case at bar the contests were properly dismissed by your office. Your decision is therefore affirmed.

REPAYMENT—DOUBLE MINIMUM EXCESS.

LURETTA R. MEDBURY.

A claim for repayment of double minimum excess cannot be allowed, if the land at date of entry was properly rated at double minimum, though the road opposite said land was not constructed, and the grant therefor was afterwards forfeited.

Secretary Bliss to the Commissioner of the General Land Office, October 5, 1897. (F. L. C.) (F. W. C.)

I am in receipt of your office letter "M" of June 23, 1897, reporting adversely upon the application filed on behalf of Luretta R. Medbury for repayment of double minimum excess paid by Samuel Medbury upon cash entries Nos. 2106 to 2116, inclusive, Bayfield series, Wisconsin. These cash entries were made on August 7, 1872, and Medbury paid at the rate of two dollars and fifty cents per acre, the lands being within the primary limits of the grant under the act of May 5, 1864 (13 Stat., 66), to aid in the construction of the Wisconsin Central Railroad. Said road was not constructed opposite the lands covered by said cash entries, and by the act of March 2, 1889 (25 Stat., 888), the price of lands similarly situated was reduced to one dollar and twenty-five cents per acre. The grant opposite this portion of the road was forfeited by the act of September 29, 1890 (26 Stat., 496).

From the above recitation it is clear that at the time Medbury made the entries in question he was properly charged two dollars and fifty cents per acre, the lands being rated at the double minimum price.

In the application under consideration it is urged that as the grant opposite the lands in question has been forfeited, it "has afterwards been found" that the lands covered by said entries are not within the limits of a railroad grant, and repayment should be made under the provisions of the second section of the act of June 16, 1880 (21 L. D., 287). Said section provides:

and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

It has uniformly been ruled by this Department that the proper construction of said section makes the condition at the time of the entry the criterion in determining the question as to whether repayment should be made under said section.

The case under consideration is in all important particulars similar to that of Byron Allison (19 L. D., 458), in which it was held that repayment of the double minimum excess can not be allowed where the land was properly held at that price at the date of its sale.

On the other hand, in the case of Thomas Kearney (7 L. D., 29), repayment was allowed specifically upon the ground that at the time Kear-

ney's entry was made the land was not within the limits of a railroad land grant, the same having been forfeited prior to the making of his entry.

The argument filed in support of the application under consideration discloses no sufficient reason for departing from the previous adjudications of this Department, and the application is accordingly denied.

REPAYMENT—PRICE OF LAND—WITHDRAWAL—DOUBLE MINIMUM.

JAMES S. ELLIOTT.

The line of the Northern Pacific road between Wallula, Washington, and Portland, Oregon, as shown by the map of general route filed August 13, 1870, followed the north bank of the Columbia River within the Territory of Washington, and the width of the withdrawal thereon was consequently governed by the provisions in the granting act relative to the extent of the grant where the line of road passed through a Territory; and the fact that the said river was not correctly located on said map would not affect the extent of said withdrawal.

The price of the reserved alternate sections falling within the limits of the withdrawal made on the general route of the Northern Pacific was, by the terms of the grant to said company, fixed at double minimum.

Repayment of alleged double minimum excess can not be allowed, if the land at date of entry was properly rated at double minimum.

Secretary Bliss to the Commissioner of the General Land Office, October 5, 1897.
(F. L. C.) (F. W. C.)

I am in receipt of your office letter "M" of July 2, 1897, reporting adversely upon the application filed on behalf of James S. Elliott for repayment of the double minimum excess paid on Oregon City, Oregon, cash entry No. 3268, covering the NW. $\frac{1}{4}$ of Sec. 11, T. 2 S., R. 27 E.

From your report it appears that according to the diagram on file and in use in your office said tract was at the date of Elliott's purchase, September 5, 1888, within the limits of the withdrawal upon the map of general route of the Northern Pacific Railroad between Wallula, Washington, and Portland, Oregon, *via* the valley of the Columbia River.

The grant for the Northern Pacific Railroad, made by the act of July 2, 1864 (13 Stat., 365), is of

every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, etc.

According to the map of general route filed by said company on August 13, 1870, the line of the road between the points before named followed the Columbia River along the north bank, and as said river formed the boundary line between the then Territory of Washington and the State of Oregon, the entire location appeared to be within the

Territory of Washington, and for that reason the withdrawal was made upon said map for forty miles in width on each side thereof. It appears, however, that upon said map of general route the Columbia River was incorrectly located; so that if the river be changed and properly represented, and the line of location remain without regard to its relative position to said river, the line of road as located would, in several places, cross the river and for a short distance be within the State of Oregon. Opposite one of these places where the location would cross the river upon the principle above stated, the tract in question lies, and it is urged that for the portion thus shown in the State of Oregon the limit should be only twenty miles instead of forty, and as the tract in question is more than twenty miles from the line of general route, the same was incorrectly included within the limits of the withdrawal upon the general route and comes within the class of lands for which repayment is authorized by the act of June 16, 1880.

From a review of the matter I am clearly of the opinion that the location was made with respect to the river without regard to its actual location by section, township, or range, and that the location of the river, however shown, would govern the intended general route of the road. This being so, the entire line was located within the Territory of Washington, and it was proper to establish a forty mile limit thereon.

It is further urged in support of the application that as the line was never definitely located opposite the tract in question, the grant never attached to any specific tracts, and that consequently there was no increase in price in the alternate sections.

In answer to this, I might say that the sixth section of the granting act, after providing for the withdrawal upon the general route, declares that the reserved alternate sections shall not be sold by the government at less than two dollars and fifty cents per acre when offered for sale, thus increasing the price of the even numbered sections included within the limits upon the map of general route. The portion of the road opposite the tract in question was never constructed, and the price of the even numbered sections was reduced to one dollar and twenty-five cents per acre by the act of March 2, 1889.

As before stated, Elliott made his purchase September 5, 1888, at which time the land was properly rated at two dollars and fifty cents per acre, and there is no authority under the law for granting the application for return of the double minimum excess.

The application is accordingly denied.

SUCCESSFUL CONTESTANT—PREFERENCE RIGHT—SECOND ENTRY.

WYATT v. WELLS.

The right of a successful contestant to exercise the preferred right of entry accorded by the act of May 14, 1880, must be determined by his qualification to make such entry at the time he applies therefor, irrespective of his qualifications prior thereto.

Section 2, act of March 2, 1889, provides for the allowance of a second homestead entry in any case in which the applicant, prior to the enactment of the statute, made a homestead entry, but has not perfected title thereunder, either before or since that time.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 6, 1897. (E. M. R.)

This case involves the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 21, T. 11 N., R. 20 E., Sacramento land district, California.

The record shows that on January 24, 1889, Henry J. Wells made homestead entry of the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 21, T. 11 N., R. 20 E. A contest having been filed against this entry by one James E. Gallaner, it was canceled as to the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ thereof, on December 30, 1891, and thereafter, on January 16, 1892, the said Gallaner made homestead entry for the tracts in controversy. Subsequently Wells, the defendant-respondent, contested the entry of Gallaner on the ground of non-compliance with law, and your office, on June 24, 1896, sustained the contest and canceled the entry. Thereafter, on July 11, 1896, William W. Wyatt, the plaintiff-appellant, made application to enter under the homestead law the tracts in controversy, which the local officers rejected for the reason that Wells was entitled to thirty days from the date of notice of the cancellation of Gallaner's entry within which to exercise his preference right of entry. Three days thereafter, on July 14, 1896, Wells filed his relinquishment of his homestead entry above described, and at the same time his application to enter the land theretofore covered by the entry of Gallaner. The local officers accepted the application and placed the entry of record. The plaintiff appealed to your office, and on March 9, 1897, you affirmed the action of the local officers; from which decision appeal by Wyatt brings the case to the Department for consideration.

The appellant contends that the defendant-respondent was an entry-man of record at the time of initiating contest, and remained so until after the cancellation of the entry of Gallaner, and, as such, was disqualified from the exercise of a preference right of entry; that when he undertook to exercise such right he was confronted by an adverse claimant for the land; that only in the absence of an adverse claim could he have been permitted to have in this manner segregated two tracts of land, the one under his homestead entry and the other under his preference right of entry; and that such a position is an anomalous

one and unknown to the law relating to the public land. It is urged that inasmuch as the plaintiff was a settler upon this land at the date of the cancellation of the entry of Gallaner, his rights attached *eo instanti*. It is further urged, under the authority of *Newbanks v. Thompson* (22 L. D., 490), that the entry of Wells could not be allowed in any instance. *Per contra*, the defendant-respondent insists that having brought a contest, and having succeeded in cancelling the entry of Gallaner, he was entitled to a preference right of entry; that his qualification prior to the time that he sought to exercise the right of entry has nothing to do with the case; that when he made said application to exercise a preference right of entry under the act of May 14, 1880, he was qualified in all respects to make such entry; and that the case is in all essential respects similar to one who as a minor files a contest against an existing entry and secures the cancellation thereof, and who, when he makes his application to enter the tract, has reached his majority.

The syllabus of the case of *Newbanks v. Thompson*, *supra*, cited by counsel, is as follows:

A party who settles on land covered by the entry of another, under an agreement with the prior entryman that such entry shall be relinquished for his benefit, acquires no right as a settler as against the intervening entry of another, made on the relinquishment of the prior entry, if he fails to secure the release of said land, through contest, or in the manner agreed upon.

The right to make a second homestead entry under section 2, act of March 2, 1889, can not be invoked for the protection of a settler who at the time of his settlement has an entry of record for another tract.

On page 493 in said case it was said, speaking of the second section of the act of March 2, 1889 (25 Stat., 854):

It was not intended by said act to allow an entryman while his entry is of record to lay claim to another tract under the settlement laws He can not by an entry for one tract and a settlement on another segregate both from the public domain.

I am unable to see, however, in what way that case controls the one at bar. It would be manifestly improper, as that decision correctly holds, to allow a man, by entry and settlement upon different tracts, to segregate the one and appropriate the other from the public domain. This would be opposed to the spirit of the homestead law. The facts in the case at bar present an entirely different case. Wells's entry segregated the land covered thereby, and his preference right of entry precluded the land covered thereby from entry by any other for a period of thirty days, and thereafter, in a sense, reserved that from entry; but this last was a right guaranteed by the act of May 14, 1880, and it seems, under the authorities, would have reserved the land in behalf of a person whose qualifications were not known. When Wells applied to exercise his preference right he had relinquished the former entry, and under the second section of the act of March 2, 1889, was entitled to make entry of the land in question.

Whilst the case of *Dowman v. Moss* (19 L. D., 526) held, in speaking of this section, "it was not intended to allow those who made entry before the approval of the act to relinquish it and make a new entry," this holding has since been overruled and set aside by the case of *Hertzke v. Heuermond* (25 L. D., 82), and it was said therein that such holding in the case of *Dowman v. Moss* was *obiter dictum* and would not, therefore, be followed. Acting Secretary Ryan said, in speaking of said second section:

I have no hesitation in concluding that it provides for the allowance of second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homestead law but has not perfected title thereunder, either before or since that time.

The decision appealed from is affirmed.

PRACTICE—TOWNSITE—SURVEY—PUBLIC PARK.

CITY OF KINGFISHER *v.* WHIPPLE ET AL.

The action of townsite trustees, in the disposition of town lots, may be reviewed by the Commissioner of the General Land Office under the rules governing contests before the local land offices.

The act of May 14, 1890, empowers townsite trustees in Oklahoma to approve surveys of townsites made prior thereto; and the limitation as to the acreage that may be included in a public park, under section 22, act of May 2, 1890, is not applicable to a survey so adopted.

A survey of a townsite, made by the provisional authorities of a municipality, becomes operative from and after its execution and approval by said authorities, when subsequently adopted by the townsite trustees after entry.

The law applicable to townsites contemplates a survey of the land into lots and blocks before deeds may be given.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 7, 1897. (G. C. R.)

This case involves twenty-seven and one half acres, being a part of the S. $\frac{1}{2}$ of Sec. 15, T. 16 N., R. 7 W., I. M., and is now a part of the city of Kingfisher, Oklahoma, having been entered for municipal purposes by townsite board No. 3, on August 5, 1890. The tract is known as Oklahoma Park.

It appears that certain persons—namely, E. D. Whipple, James A. Morris, Joseph Kaufman, James A. Seese, W. D. Cornelius, William Kinman, William Savage, and Marion Moxley—settled on different parts of said park during the spring and summer of 1889, and in 1890, after the land had been entered for town purposes, made application for deeds. Townsite board No. 6 allowed the applications of all the parties above named, except those of William E. Savage and James A. Seese, which the board denied because it was not shown that either of them was occupying the land at date when the land was entered for townsite purposes. As respects the other applicants, the board found that they were each occupying their claims when the land was surveyed, and also

when the townsite board set apart the land for a park, etc. Savage and Seese appealed, and your office, by decision dated January 21, 1897, affirmed the action of the board with respect to the applications of the two appellants, but reversed that action as to all the other applicants, thus holding that none of them was entitled to the deeds applied for. From that action all the applicants, except Joseph Kaufman, have appealed to this Department.

The appeal alleges the following principal grounds of error:

1. In reversing the action of the board of trustees as to Whipple, Morris, Cornelius, Kinman and Moxley, in the absence of any appeal from said decision involving the rights of said defendants, and in assuming the power and jurisdiction to pass upon any of the rights of the defendants other than W. E. Savage and James A. Seese, who alone appealed.

2. In holding that the improvements on the several lots were made by defendants with knowledge that the land they respectively settled upon had been set apart for a park by the inhabitants of said village, and erred in drawing such conclusion from the agreed statement of fact.

3. In holding that the inhabitants of Lisbon (now Kingfisher) set apart the land included in Oklahoma Park for park purposes, and in holding that they had the right to do so.

4. In holding that when the townsite board No. 3, accepted the survey of said townsite of Lisbon (now Kingfisher), said survey became operative from May 7, 1889.

5. In holding that townsite boards are limited to issuing deeds for lots only, and cannot issue them until the land has been surveyed and platted into blocks, lots, streets and alleys.

It appears that the inhabitants of Lisbon (now Kingfisher) caused to be surveyed and platted into blocks, lots, streets and alleys for townsite purposes the S. $\frac{1}{2}$ of said section 15, the survey being completed May 7, 1889; on that day the authorities of the town passed a resolution designating and setting apart, in addition to that marked on said plat for park purposes, the following:

All lots and part of lots on blocks 56, 57, 58, 59, 60, 81, 82, 83, 84, 85, 86, and 87 lying east of the top of the high bank on the west side of "Uncle John's Creek," for a city park to be known as "Oklahoma Park."

The authorities of Lisbon changed the name of the village to "Kingfisher," and thereafter (August 5, 1890,) entered the S. $\frac{1}{2}$ of said Sec. 15. The plat made by the inhabitants of Lisbon, which designated Oklahoma Park as part of said town, was adopted by said townsite board as the correct plat of the town under its new name.

The several applicants applied for parts of the land covered by the park, the description being by metes and bounds. The decision appealed from contains these descriptions and it is unnecessary here to re-describe them.

On March 7, 1891, the village of Kingfisher filed a protest before townsite board No. 3 against issuing deeds to any of the applicants for any part of said park, because the lands embraced in the lots applied for was set apart as a public park in the original survey of the city of Lisbon; that the plat was approved by the townsite trustees; that the tracts applied for were a part of the land reserved as a public park long before claimants or any of them made any claim to it.

A hearing was ordered, and upon the day fixed the city of Kingfisher refused to deposit with the disbursing officer of the board one day's expenses of the trial, and for that reason the city was held to be in default. No appeal was taken from that action, but your office, on April 28, 1894, modified said decision, and directed that the plat of the city be so modified that the area of the park should not be less than ten, nor more than twenty, acres. Thereupon, the applicants for the lots appealed to this Department. On this appeal the action of your office was modified, and without deciding upon the merits of the case, the same was returned, with directions that the village of Kingfisher be allowed to submit proof in support of its protest. (311 L. and R., 118.)

On January 10, 1896, the village of Kingfisher and the claimants to the lots filed with the townsite board No. 6 an agreed statement of facts, and submitted the same as the testimony in the case; this resulted in the action of the board, and of your office, above set out, from which the appeal herein was taken. This agreed statement of facts is fully set out in your said office decision, and need not here be repeated.

From these facts, it can not be claimed that any of appellants settled upon or improved the land prior to the survey, platting or dedication of the land covered by the park by the municipal authorities of Lisbon. That survey was completed May 7, 1889, and, as before seen, adopted by the townsite board after the land was regularly entered for townsite purposes, and given a new name.

Appellants in their first assignment of error complain that your office, without any appeal, reversed the action of the townsite board as to certain of the claimants. It is insisted that your office was without power or jurisdiction to take such action.

In townsite cases, where, under the statute, townsite boards are given power to dispose of town lots, their action may be reviewed by your office under rules prescribed for contests before registers and receivers of local land offices. See Regulations for Oklahoma Townsites, 19 L. D., 334.

Rule 48 of Practice provides that: "In case of failure to appeal from the decision of local officers, their decision will be considered final as to the facts in the case, and will not be disturbed by the Commissioner only as follows:

1. When fraud or gross irregularity is suggested on the face of the papers.

2. When the decision is contrary to existing laws and regulations," etc.

In this case the facts are not disputed—indeed, they are agreed to; but your office dissents from the opinion of the townsite board as to the correct conclusion to be derived from the agreed statement of fact. The board found that certain of the appellants had settled upon the land before the same was dedicated by the provisional authorities of Lisbon as a park. Your office dissents from that finding—holding that the agreed statement of facts does not support it.

When the facts are agreed to, as in this case, your office undoubtedly has the power to correct any erroneous conclusion which the local officers or townsite boards may gather from such facts. As before seen, your office did not err as to those conclusions; and this is all that need be said as to the second ground of error.

It is insisted in the 3d and 4th specifications that the authorities of Lisbon, now Kingfisher, had no authority to set apart the land for park purposes, and that it was error to hold that when on August 5, 1890, the townsite board (No. 3) accepted the survey of the Lisbon townsite, the same became operative from May 7, 1889.

The 1st section of the act of May 14, 1890 (26 Stat., 109), relating to townsite entries in Oklahoma, empowers the Secretary of the Interior to provide regulations for the government of townsite trustees in the execution of their trust,

including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof.

This statute clearly implies that when an entry of lands for townsite purposes shall have been made, the trustees may adopt any survey of the lands into lots, blocks, etc., which may already have been made by the inhabitants of the townsite. Circular, May 24, 1890, 10 L. D., 604.

The act of May 2, 1890 (26 Stat., 81), which makes provisions for a temporary government of Oklahoma, etc., provides in its 22d section:

That hereafter all surveys for townsites in said Territory shall contain reservations for parks (of substantially equal area, if more than one park), and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres, and patents for such reservations to be maintained for such purposes shall be issued to the towns, respectively, when organized as municipalities.

Considering these statutes together, it was the evident intent of Congress to limit the acreage for parks and schools to twenty acres upon all townsites, when necessary surveys of the lands embracing them were made after May 2, 1890; but under the 1st section of the act of May 14, 1890 (*supra*), power was given to the trustees to approve such surveys of lands for townsite purposes as may already have been made by the provisional authorities of the municipalities; and, if such prior surveys show that a reservation for park purposes in excess of twenty acres had been made, the plat of the townsite would nevertheless not be disturbed

on that account. *Adams et al. v. City of Guthrie*, 19 L.D., 43; same (on review) 300 L. and R., 397.

In such case the survey becomes operative from and after its execution and approval, when subsequently adopted by the townsite trustees, after entry.

As before seen, the survey of the land in controversy was completed and approved by the provisional government of Lisbon, May 7, 1889, and from what is above said became operative and legal from that date.

It appears that the land in controversy has not been surveyed into lots, etc., the applicants applying for their claims under descriptions by metes and bounds. The laws applicable to townsites contemplate a survey into lots, blocks, etc., before deeds may be given.

For reasons hereinbefore given, the decision appealed from is affirmed.

MISSION LANDS—ACT OF MARCH 2, 1853—OCCUPANCY.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* ST. JOSEPH ROMAN CATHOLIC MISSION.

The confirmation of title to mission lands under the act of March 2, 1853, is limited to the lands actually used and occupied in the maintenance of the mission at the date of the passage of the act; but, in determining the extent of such occupancy, the apparent necessities of the mission at said date may be considered, in the absence of positive evidence as to the actual boundaries of the land so used and occupied.

Secretary Bliss to the Commissioner of the General Land Office July
(W. V. D.) 12, 1897. (F. W. C.)

The Northern Pacific Railroad Company, Willis Smith and the St. Joseph Roman Catholic Mission have appealed from your office decision of April 22, 1896, in the matter of the case of the Northern Pacific Railroad Company *et al.* *v.* the St. Joseph Roman Catholic Mission, involving lots 1, 2, 3 and 4, the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 13, T. 12 N., R. 16 E.; the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 1 and 2 of Sec. 18; and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 7, T. 12 N., R. 17 E., North Yakima land district, Washington, in which decision you awarded lot 1 of Sec. 13, amounting to 54.79 acres, to the Mission, rejected the claim of the Northern Pacific Railroad Company to the tracts in the odd numbered sections, and rejected the application to enter presented by Willis Smith, as to lot 1 of section 13, which had been awarded to the Mission, and hold for allowance the application of Charles Kinne as to the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 1 and 2 of Sec. 18, T. 12 N., R. 17 E.

This matter was before considered in departmental decision of October 9, 1894 (19 L. D., 196), and is again before this Department as the result of the proceedings therein directed to be taken.

The following statement of facts is taken from said opinion, to wit:

The claim of the church is based upon the act of March 2, 1853 (10 Stat., 172), entitled "An act to establish the territorial government of Washington," which act contains a proviso in the first section as follows:

"That the title to the land, not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in said Territory, or that may have been so occupied as missionary stations prior to the passage of the act establishing the Territorial government of Oregon, together with the improvements thereon, be, and is hereby confirmed and established to the several religious societies to which said missionary stations respectively belong."

Township 12 N., R. 17 E., was surveyed between June 24, and July 4, 1867, and the plat of survey was approved by the surveyor-general October 27, following, and your office decision states that the mission claim is not laid down upon the plat nor mentioned in the field notes pertaining to said survey.

Township 12 N., R. 16 E., was surveyed between November 2, and 6, 1872, and the plat of survey was approved by the surveyor-general July 16, 1873.

Your office decision states that the mission improvements are mentioned in the field notes of this survey as being on the south side of section 13, and are shown by the plat to be on lot 1, of said section.

On November 15, 1878, the right Rev. A. M. A. Blanchett, bishop of Nesqually, filed an application on behalf of the Roman Catholic church for the issuance of patent to him as trustee for the church, for lands embraced in the St. Joseph Catholic Mission Station, the same being described by metes and bounds, evidently intended to embrace about six hundred and forty acres, including the land covered by the mission buildings.

This application was supported by affidavits alleging that the mission was established prior to and existing at the date of the passage of the act of March 2, 1853 (*supra*).

Prior to the filing of this application claims had been filed under the homestead and pre-emption laws embracing nearly the entire tract covered by the church's application. On some of these claims proof had been made and final entries allowed.

On August 20, 1883, Aegidius Junger, the then bishop of Nesqually, relinquished the claim of the church to certain lands covered by its application which lands were embraced in the entries of one Timothy Lynch and Antony Herke. Acting upon said relinquishment patents issued upon said entries.

The claim of the Northern Pacific Railroad Company to the portion of the land covered by the church's application, designated by odd numbers, is based upon the fact that said lands are within the primary limits of its grant, as shown by the map of general route of the branch line filed June 11, 1879, and the definite location shown upon the map filed May 24, 1884.

On January 23, 1887, the company listed on account of its grant, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 7, T. 12 N., R. 17 E.; the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and lots 3 and 4, Sec. 13, T. 12 N., R. 16 E.

On October 1, 1878, Jean Baptiste Raiberti, a Catholic priest, made homestead entry for the E. $\frac{1}{4}$ NW. $\frac{1}{4}$ and lots 1 and 2, Sec. 18, T. 12 N., R. 17 E., against which Charles Kinne filed affidavit of contest on September 19, 1887, alleging abandonment, upon which trial was had October 27, 1887, the decision of the local officers being in favor of the contestant.

The papers were forwarded to your office January 27, 1888, but before any action was taken thereon, to wit, on October 26, 1888, Raiberti relinquished his entry and the same was canceled upon the records. It is by reason of said contest that Kinne on July 18, 1889, applied to make homestead entry of said land claiming the rights accorded a successful contestant.

On June 27, 1878, Joseph M. Carnana filed a pre-emption declaratory statement embracing lots 1, 2, 3 and 4, Sec. 13, T. 12 N., R. 16 E., and August 29, 1879, he made proof and payment for the land.

On October 26, 1888, he relinquished his claim to the land, not wishing to antagonize the claim of the church, with which he appears to have been connected, and upon said relinquishment your office decision cancels his entry.

On June 11, 1889, Smith applied to enter said land and it is on account of said application that he claims the right now urged before this Department.

It is clear that the claim of the church, if entitled to the benefits of the act of March 2, 1853, is superior to the claim asserted by the other parties, and it is first necessary to determine the rights of the church under its application.

On March 26, 1889, Bishop Junger made formal application for the issuance of patent for the lands embraced in the mission application and gave notice, by publication, of his intention to submit proof to establish the validity of the mission's claim.

At the appointed time all parties appeared, the only testimony offered being that on behalf of the mission's claim, which consisted largely of the depositions of persons in distant places, taken under commissions duly issued.

The testimony is extremely meager and being generally of persons connected with the church is presumed to be the most favorable that could be offered in support of its claim.

It appears that two priests, acting under the direction of the bishop of Nesqually, in April, 1852, at the request of the Yakima Indians, established a mission upon the land in question, which seems to have been regularly maintained for the purposes intended from that time until 1855, when an Indian war occurred and the mission buildings were burned.

It was not until about 1866 that the mission was again established, when new buildings were erected upon the site of those destroyed in 1855 and the place seems to have since been continuously used as a mission station to the date of the hearing.

There does not appear to have ever been any survey of the mission claim approved by the surveyor general, but the church claim was duly filed with the register and receiver and the surveyor general as early as June, 1868, and in 1871 the register of the district land office issued a certificate setting forth "that all necessary papers to complete the title of the St. Joseph Mission on the Attanum river had been filed in this office, and all that is wanting is the survey of the land," etc.

In 1872, prior to the survey of the township, the bishop of Nesqually had a survey made of the mission claim, and prior to the approval of the official plat of survey filed a copy of the same, accompanied by the field notes, in the office of the surveyor general, with a request that the case be delineated upon the official plat of survey when filed. Said papers seem to have been mislaid in the office of the surveyor general, and were not discovered until after the presentation of the application for patent in 1878 by Bishop Blanchett.

When this matter was before considered by your office the opinion was expressed that the act of 1853 was intended to confirm to the religious societies 640 acres surrounding the Mission, if such an amount could be found free from other claims, without regard to the actual occupancy of the whole of the same.

After a careful review of the matter, however, your office decision was reversed, and it was held

that the confirmation made by the act of 1853, on account of mission claims, must be restricted to the land actually used and occupied in the maintenance of the same at the time of the passage of said act.

Your office was therefore directed to

cause any inquiry to be made in the best proper manner, to ascertain the lands actually occupied by the St. Joseph Roman Catholic Mission on March 2, 1853, of which survey should be regularly made, and upon the approval of the same by the surveyor general, patent may issue thereon to the bishop, in trust for the church.

It now appears that, acting upon this direction, the surveyor general of the State of Washington was, by your office letter "F" of December 27, 1894,

directed to ascertain the lands occupied and used at the date named, and for that purpose you will duly advise the Mission authorities and any other interested parties of the action of the Secretary and fix a date upon which they may be heard in the matter.

The case was heard before the surveyor general from March 18 to 22, 1895. The only testimony offered at this hearing of those professing to have any actual knowledge of the condition of affairs on March 2, 1853, was that of several Indians, presented on behalf of the Mission, whose testimony tends to show that a fence was constructed enclosing the lands occupied by the Mission. The fence as described by them and established by the surveyor general in the plat which accompanies the record, would enclose about 240 acres, or a little less than one half of the actual claim of the Mission. The existence of such a fence in the fall of 1855 or the spring of 1856 is testified to by another witness, one Ker, offered on behalf of the Mission. As against the existence of such fence the testimony of two Indians is offered by the protestants; also the testimony of a number of white witnesses, to the effect that at the time of the Indian War in 1855 there was no evidence of the existence of such fence. The depositions of the Catholic priests Chirouse and De Herboomez, who established the Mission, are also made a part of the record.

The undisputed testimony shows that the building now occupying about the center of lot 1, Sec. 13, T. 12 N., R. 16 E., is located on the site of the old Mission chapel, around which were the original enclosures; which enclosures are variously estimated to contain all the way from two or three to ten or fifteen acres. The original improvements consisted of a log dwelling and church and some outhouses and a small patch of cultivated land. It is further shown that in the spring of 1853 the priests had about a dozen cattle and a dozen head of horses.

After carefully reviewing the testimony in detail, the surveyor general, in his opinion, states:

It is admitted that they had enclosed around the Mission buildings from ten to fifteen acres. It is also admitted that they raised hay and grain, had milk cow, or cows, horses, pigs and chickens. It is fair to assume that they had pens, corrals, pastures, etc., for such, some of which is admitted by the adverse testimony. If they wintered the twenty four head of cattle and horses, the priests testify to have had on March 2, 1853, and if one acre would winter feed two head, which would be a fair estimate with their crude methods of farming, this alone would take twelve or thirteen acres.

It seems to me, therefore, that an occupancy of about twenty five acres on March 2, 1853, by the Mission, would be a just and equitable allowance. I therefore decide that the Mission is entitled to all the land lying in lot 1 of Sec. 13, T. 12 N., R. 16 E., lying south of a line parallel to the north line of said lot, and fifteen chains south thereof, containing about twenty five acres more or less.

This is rather an arbitrary division, but the building which now occupies about the center of this twenty five acre tract was located by Mr. George C. Mills, and is

recognized in the testimony as being on the site of the old Mission chapel, around which the enclosures certainly were located.

It is impossible to fix this more definitely from the Indian testimony, as they show the fences by marks upon a map, Exhibit (A), made off-hand without sealing any distances, etc., all of which their ignorance would incapacitate them from doing. Again, to fix this more definitely would cost more than the land is worth.

Upon appeal your office decision of April 22, 1896, held, as before stated, increasing the allowance on account of the Mission to the entire lot 1 of section 13, and afterwards adjusting the several claims to the balance of the land involved.

In your office decision it is stated:

Under the strict construction of the instructions of the Department of October 9, 1894, directing the investigation, giving the mission the benefit of the highest estimate of the acreage enclosed in 1853, it would be entitled to only fifteen acres, but since the priests testify that they had at the mission about twenty four head of stock (cattle and horses), I am of the opinion that they should be awarded also sufficient land to furnish grazing and hay for such stock, and that the remainder of lot 1, a little less than forty acres, is not too much to corral and support twenty four head of cattle and horses.

It is of course first necessary to determine the lands to be awarded to the Mission under the act of 1853, and as stated in the previous decision of this Department:

It is unnecessary to refer to the rights of the other parties to this controversy further than the direction that their claim, so far as in conflict with the award herein made on account of the Mission claim, must be canceled.

Since the decision of this Department last referred to, restricting the claim on account of the Mission grant to the lands actually occupied by it, the matter has been considered by the supreme court of the United States in the case of the Catholic Bishop of Nesqually *v. Gibbon* (158 U. S., 155), in which the claim on account of the grant made for the Mission under the act of August 14, 1848, which is in the same terms as the act under consideration, is restricted to the land actually occupied by the Mission and can not be made the basis for a claim to the extent of six hundred and forty acres without proof of occupation of the same.

In the case of *Leshner v. St. Paul Catholic Mission* (22 L. D., 365,) it was held that land used by the Indians as a camping ground and for pasture while they were at the Mission and attending religious services was such an occupation as to come within the provisions of the act of March 2, 1853. It is clear, therefore, in the present case, as it is shown that the fathers had on March 2, 1853, about twenty four head of stock of their own and that many Indians attended services at the Mission, that more land was actually occupied in the maintenance of the Mission than the tract covered by the buildings and within the enclosure of ten or fifteen acres including the cultivated tract. The question arises, therefore, as to the establishment of a boundary to the lands actually occupied for herding and pasturage purposes in connection with this Mission.

Upon the question as to the presence of a larger enclosure, I am clearly of the opinion that the same is not sustained by the record now before me. The testimony of the two Catholic priests, who were undoubtedly the persons having the best information on the subject, clearly disproves the presence of any outlying or larger enclosure covering the tract occupied by the Mission.

The following questions and answers are taken from the depositions furnished:

EUGENE CASSIMERE CHIROUSE.

Interrogatory No. 5: State if you know then all the circumstances attending the establishment of the St. Joseph Catholic Mission on the Ahtanum River, what buildings, if any, were erected by the Mission, their character and size and for what purpose used, how much land adjacent to the buildings, if any was fenced and in cultivation on and prior to the second day of March, 1853?

Answer: The Mission was established because of its central position and at the request of the Indians and their chief who wished it there. In 1852 a log dwelling and log church were erected, a vegetable garden was fenced in 1852 and vegetables raised there for the use of the Mission.

Interrogatory No. 10: What quantity of land was actually occupied by the Catholic church at the missionary station on and prior to March 2, 1853, and what boundaries were established to separate the St. Joseph Mission lands and to indicate that it was the specific land claimed by the church as a missionary station among the Indian tribes at that time?

Answer: When St. Joseph Mission was located in 1852 the land for many miles on the north side of Ahtanum River was given by the Indians for Mission lands below the place where the hills come nearest to the river on both sides. The Mission occupied all the land we required, which I could not describe by metes and bounds. There were no posts for lines put in, as there were no white men in Yakima county except ourselves.

LOUIS JOSEPH DEHERBOMEZ.

In answer to interrogatory No. 5: Yes, for the purpose of having a central position to preach to the Indians of Yakima County. One log house for the missionaries' residence and one log chapel for divine services. This work was done by ourselves, and one small cabin which was as much as we could do.

In answer to interrogatory No. 10: The Indians gave us all the land we wished to take. There was no white men in the country and therefore no necessity for lines. The Indian tribes, however, knew the land well.

It is therefore apparent that, as held by the surveyor general, some arbitrary rule must be resorted to in order to fix upon the quantity of land actually occupied and used in the maintenance of this Mission; and from a careful review of the entire matter I think the adjustment arrived at by your office in awarding to the Mission the entire lot 1, being the legal subdivision upon which the Mission buildings and other improvements were established, is a fair and equitable adjustment of the Mission claim. This being determined, it is next necessary to consider the company's claim to the tracts covered by the odd numbered sections.

The former recitation of the record facts shows that these lands were covered by entries of record at the date of the attachment of rights under the grant to the company and were therefore by the express

terms thereof excepted therefrom. The awarding of lot 1 to the Mission causes its elimination from the land claimed by Smith, and the entire award made in your office decision is accordingly affirmed.

ALASKAN LANDS—REGULATIONS OF JUNE 3, 1891, AMENDED.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., October 8, 1897.

Paragraph 32 of Regulations approved June 3, 1891, providing for the allowance of entries in Alaska under the act of March 3, 1891 (12 L. D., 583), is hereby amended to read as follows:

Any person feeling aggrieved by the decision of the trustee may, within thirty days after notice thereof, appeal to the Commissioner of the General Land Office, under the rules as provided for appeals from the opinions of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal, within sixty days from notice thereof, to the Secretary of the Interior, upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary. All costs in such proceedings will be governed by the rules now applicable to contests before the local land offices.

E. F. BEST,
Assistant Commissioner.

Approved:

C. N. BLISS,
Secretary.

JOHN W. KORBA.

Motion for review of departmental decision of May 5, 1897, 24 L. D., 408, denied by Secretary Bliss October 9, 1897.

PRACTICE—APPEAL—DESERT ENTRY—ASSIGNMENT—SUSPENSION.

VRADENBURG'S HEIRS ET AL. *v.* ORR ET AL.

An appeal, if not taken within the time designated by the rules of practice, must be dismissed.

An assignment of a desert land entry to one disqualified to acquire title under the desert land law, does not render the entry fraudulent, but leaves the title thereunder still in the entryman.

On the revocation of an order suspending a desert land entry, time will not begin to run as against the entryman, until due service of notice upon him of such revocation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) October 12, 1897. (C. W. P.)

On May 17, 1877, Thomas B. Orr made desert land entry, No. 291, of Sec. 10, T. 25 S., R. 25 E., Visalia land district, California. This entry,

with others, was suspended on September 12, 1877, and remained suspended until January 12, 1891, when the order of suspension was revoked. *United States v. Haggin*, 12 L. D., 34. On June 5, 1877, Orr assigned his entry to Emile Chauvin and Juan L. Noriega, and on June 11, 1884, Noriega assigned to Chauvin.

On April 15, 1886, Luther C. Vradenburg filed an affidavit of contest against said entry, alleging the non-desert character of the land and failure to reclaim. On the day set for hearing Orr did not appear, but Emile Chauvin appeared and was allowed to defend the entry, as assignee of Orr's entry. A hearing was had and the local officers decided in favor of the entryman. On appeal, your office, on April 29, 1891, affirmed the decision of the local officers as to the character of the land, but held the entry for cancellation on account of non-reclamation. But, on motion for review, by your decision of July 20, 1891, it was held that the order of suspension of the Visalia desert land entries of September 12, 1877, had the effect of holding all proceedings in *statu quo* from the date of the promulgation of said order until it was revoked, and it was ordered that the defendant be allowed three years in which to reclaim, exclusive of the time which elapsed between the date of the order of suspension and the date of the revocation of the suspension.

From these decisions the contestant appealed to the Department. In the meantime many contests were filed against the entry, accompanied by applications to enter.

The Department, on January 9, 1893, held that during the pendency of the order of suspension the local office and your office were without jurisdiction to hear and determine the case; that the contest should not have been allowed; and the hearing being unwarranted, the case was remanded for hearing *de novo*. *Vradenburg v. Orr*, 16 L. D., 35. Subsequently, Lyman D. Porter, who had applied to make homestead entry of the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of said section 10, and whose application was rejected by the local officers and your office because the land was involved in the contest case of Vradenburg against Orr appealed to the Department, and on February 16, 1895, your office decision was affirmed. In this decision the Department, referring to departmental decision of January 9, 1893, in the case of *Vradenburg v. Orr*, said:

From all that has been said, it is clear that the instructions in this particular case and the decisions of this Department have not been followed by the local office, and you will therefore remand this case to the local office and direct a full hearing as to the character of the land and the charges of fraud and collusion. You will further direct the local office to notify every person having any interest in this land, including the heirs of said Vradenburg, to appear at said contest, and allow them an opportunity to submit evidence.

Whereupon, the heirs of Vradenburg and other contestants and applicants to enter, as well as the defendant Orr and Chauvin, transferee, were notified of a hearing to be had on June 6, 1895, when Lyman D. Porter, Hiram L. Waits, John L. Wasson, Teresa Parero, W. B. Tim-

mons, James Harrington, Thomas J. Taggart, contestants, and Emile Chauvin, transferee, appeared. The other contestants and applicants made default. Wasson, Waits, Parero, Timmons and Harrington filed an application to have their contests joined and tried together, which was granted.

Porter was ruled out at the hearing on the ground that he had no interest in the land and had filed no application to contest.

The contest of Taggart, instituted on February 18, 1891, was heard first, and then Wasson and others were heard as joint contestants.

Taggart, in his affidavit of contest, alleged that the land is non-desert in character, non-reclamation and fraud in the filing of the entry. The local officers found that the charge of non-desert character of the land was not proven; that the charge of non-reclamation was premature; and that there was no evidence to support the charge of fraud; and they recommended that Taggart's contest be dismissed.

Upon the contests of Wasson and others, alleging non-reclamation, they said:

From the evidence it appears that the transferee, Chauvin, had constructed a pumping plant on the land in contest, but that it was not of sufficient power and capacity to irrigate any one of the smallest legal subdivision of said section; that he also had a windmill and small reservoir on another portion of said section which would only irrigate from one to three acres; that about six acres of the land had been ditched and checked; that no other acts of reclamation had been done.

They were therefore of opinion:

That the said desert land entry No. 291 should be cancelled upon the showing made by Wasson *et al.* in their testimony introduced in support of their allegations of non-reclamation; that preference right of entry be allowed John L. Wasson for E. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of said section; Teresa Parero for SW. $\frac{1}{4}$, W. B. Timmons for NW. $\frac{1}{4}$, James Harrington for W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and Hiram L. Waits for E. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section.

From this decision an appeal was taken by Porter, Taggart and Chauvin, and your office, on April 9, 1897, affirmed the action of the local officers in denying Porter the right to submit testimony at the hearing, but reversed their judgment in favor of Wasson, Parero, Timmons, Harrington, and Waits, and held that the assignment to Chauvin was a nullity, and that consequently the legal title was in Orr.

Your office also held that as Orr had not elected to claim the benefit of the act of March 3, 1891, he would be entitled to three years only from the date of entry, exclusive of the time of suspension, to make reclamation of the land, were it not for the act of July 26, 1894 (28 Stat., 123), and the act of August 4, 1894 (28 Stat., 226); that these acts have given additional time to the entryman, but it not appearing when Orr was notified of the revocation of the order of suspension, it is impossible to ascertain when the time expires for the reclamation of the entry, but that it was apparent that it had not expired on March 30, 1894, the time the last contest was filed, nor had it expired on the day of the

hearing; and that all of the said contests were therefore premature, and the contests were dismissed.

Taggart, Wasson, Parero, Timmons, Harrington and Waits appealed to the Department. Chauvin also appealed. But the attorney for the contestant, Taggart, has filed a motion to dismiss Chauvin's appeal, on the ground that it was not filed within the time prescribed by the rules of practice.

Your office decision was rendered on April 9, 1897, and it appears that on the same day the resident attorneys for Chauvin, were notified of said decision. Excluding the day of mailing and the one day allowed by the rules of practice, the time within which the appeal was required to be filed, under the rules, began to run on April 11, 1897, and expired on June 10, 1897. The appeal was not filed in the General Land Office until June 17, 1897. Chauvin's appeal, appearing not to have been filed within sixty days from notice of decision, as required by the rules, must be, and is hereby, dismissed. *Dober v. Campbell et al.*, 17 L. D., 139.

I concur in your office decision affirming the judgment of the local officers dismissing Taggart's contest.

As the assignment by Orr was made prior to April 15, 1880, it must be recognized, if not otherwise violating the law. *David B. Dole*, 3 L. D., 214. If it is void by reason of Chauvin's holding more than one section of land, that does not of itself render the entry fraudulent, but the title still remains in the entryman. *Owens et al. v. State of California*, 22 L. D., 369; *David B. Dole, supra*.

Section second of the desert land act of March 3, 1877 (19 Stat., 377), provides that all lands, exclusive of timber and mineral lands, which will not without irrigation produce some agricultural crop, shall be deemed desert lands within the meaning of the act; and it is held by the Department that the term "crop" means such an agricultural production as would be a fair reward for the expense of producing it. *Babcock v. Watson et al.*, 2 L. D., 19.

The evidence as to the character of the land is conflicting; but the local officers and your office concur in finding that the land is desert land, and in such cases it is the settled ruling of the Department that the conclusions of your office and the local officers will not be disturbed unless clearly wrong. A careful examination of the testimony does not show that the findings of fact, concurred in by your office, are clearly erroneous.

Taggart's charge of failure to reclaim was clearly premature. His affidavit of contest was filed on February 18, 1891. The suspension took effect September 28, 1877, and was not revoked until January 12, 1891. *Russell v. Haggin* (18 L. D., 420).

Your office having decided that the assignment to Chauvin is void, and his appeal from your office decision being dismissed, the question occurs: Were the contests of Wasson, Parero, Timmons, Harrington, and Waits premature as against the entryman, Orr?

Orr has made no defense, but, under the decisions of the Department, the title, whatever it may be, is in him. His time for reclaiming the land and making final proof and payment therefor, under the act of 1877, would have expired at the date said affidavits of contest were filed, but that the period of suspension should be excluded from the time allowed by said act. But there is nothing in the record to show that Orr was ever served with notice of the revocation of the suspension of the entry, and it is held in *Farnell et al. v. Brown* (on review), 21 L. D., 394; *White v. Dodge*, Id., 494; and *Roscoe et al. v. Foster et al.*, 24 L. D., 435, that on the revocation of the suspension time will not begin to run against the entryman until due service of notice upon him of such revocation. The record in this case not showing that Orr had received notice of the revocation at the time the affidavits of contest were filed, it follows that these contests, charging a failure to reclaim the land within the time allowed by the desert act of 1877, were prematurely brought, independent of the acts of July 26, 1894 (28 Stat., 123), and August 4, 1894 (28 Stat., 226), the effect of which upon the entry in question it is therefore unnecessary to consider.

For these reasons, your office decision is affirmed.

ADDITIONAL HOMESTEAD—ACT OF MARCH 2, 1889.

SAMUEL S. MONTGOMERY.

A purchase by a homestead entryman under the act of June 15, 1880, of the land covered by his entry (eighty acres), is such a compliance with the conditions of the homestead laws as will entitle him to the exercise of the additional right conferred by section 6, act of March 2, 1889.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 15, 1897. (G. B. G.)

Samuel S. Montgomery has appealed from the action of your office of March 13, 1896, requiring him to show cause why his homestead entry No. 20,578, for the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 18 N., R. 25 W., Harrison, Arkansas, "shall not be canceled" for illegality. As no decision had been rendered at the time the appeal was taken, there was no basis for the appeal, but on July 7, 1896, your office, by letter of that date, to the local officers at Harrison, Arkansas, adverted to said appeal and held said entry for cancellation.

The irregularity of the appeal will be waived, and the matter treated on its merits.*

It appears that on August 20, 1879, the said Montgomery made home-

* In a letter of First Assistant Attorney Campbell to the Commissioner of the General Land Office, dated October 21, 1897, it is stated that an informal appeal was filed subsequently to the one above referred to, which, although defective, authorized the transmission of the record to the Department.

stead entry for eighty acres of land in the Harrison land district, Arkansas, to wit, the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 20, T. 17 N., R. 25 W., and on November 21, 1882, he completed title to the same under the act of June 15, 1880. On October 22, 1894, he made homestead entry for the land first above described, which is the subject matter of the present proceeding. This was made under section 6 of the act of March 2, 1889.

Your office holds that a homestead entry completed under the act of June 15, 1880, is not a legal basis for an additional entry under said section 6 of the act of March 2, 1889.

In this I think your office clearly erred. Section 6 of the act of March 2, 1889 (25 Stat., 854), provides:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

Montgomery shows himself to be entitled to enter a homestead under the provisions of the homestead laws, unless precluded by his former entry, and the land now applied for appears to be subject to homestead entry, and, added to the quantity previously entered by him, does not exceed one hundred and sixty acres. The only question is, whether he has complied with the conditions of the homestead laws and made his final proof thereunder for the eighty acres originally entered by him, and received the receiver's final receipt therefor. And this proposition reduced to further analysis is resolved into, whether a homestead entry completed under the act of June 15, 1880, is a compliance with the homestead laws.

The second section of the act of June 15, 1880 (21 Stat., 237), is as follows:

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

In the case of Martha A. Carter, 9 L.D., 604, wherein the Department had under consideration the cash entry of said Carter, made under said act, for certain lands in the State of Alabama, the legality of said entry was questioned, for the reason that the joint resolution of May 14, 1888 (25 Stat., 622), provided that "offered" lands in the State of

Alabama should be disposed of "only" "under and according to the provisions of the homestead laws." In that case it was said:

In my opinion, the joint resolution referred to was not intended to repeal, as to the public lands in Alabama, the second section of the act of June 15, 1880. While an entry under that section is, no doubt, a "cash entry," in one sense and not merely a consummation of the homestead entry on the previous existence of which the right to purchase is based, it still remains true that such a "cash entry" is by the statute allowed only in view of the prior homestead entry, and stands in much the same relation to the latter as would a cash entry made under the "commutation clause" of the homestead act. The making of such entries is not what is technically meant, in public-land law, by "private sale," against which it is that the prohibition in the resolution was really directed. In my opinion, the act of June 15, 1880, is in fact a part of the "homestead" system, to the whole of which the name "homestead laws" is generically applied in the provision of the resolution that only under those "laws," should lands in Alabama be disposed of during the period mentioned.

This reasoning is, in my judgment, sound, and it follows that one who has "complied with" the "conditions" of the "homestead laws" within the meaning of that language, as used in the sixth section of the act of March 2, 1889, *supra*, includes a person who has perfected title to a homestead entry under the act of June 15, 1880.

It appears from the record that Montgomery made final proof under said act, and received the receiver's final receipt therefor.

In the recent case of Nancy A. Stinson (25 L. D., 113), wherein the Department considered at length the effect of the 6th section of the act of March 2, 1889, *supra*, it was said:

Congress intended to provide a means whereby every homesteader might acquire title to one hundred and sixty acres of land, notwithstanding a prior partial exercise of the homestead privilege.

The case of Montgomery is within the spirit of the 6th section of the act of 1889, *supra*, and is supported by these adjudications.

Your office decision holding said entry for cancellation is hereby reversed.

PRACTICE—REHEARING—SECOND CONTEST—RESIDENCE.

GRIFFIN v. SMITH.

A decision of the Department, denying a motion for a rehearing on the ground that the matters therein alleged were not in issue at the original hearing, does not preclude the Commissioner of the General Land Office, in the exercise of his original jurisdiction, from subsequently directing an inquiry, in the nature of a new contest, to determine questions arising since the hearing of the original suit.

A contestant, who claims a right of entry on the ground of priority of settlement, must show a compliance with the settlement laws and the establishment and maintenance of a residence in good faith.

Secretary Bliss to the Commissioner of the General Land Office, October (F. I. C.) 15, 1897. (H. G.)

On May 30, 1893, George A. Griffin made homestead entry for the SE. $\frac{1}{4}$, Sec. 23, T. 105 N., R. 70 W., in the land office at Chamberlain,

South Dakota. On June 19, 1893, Francis A. Smith made application to enter the tract alleging settlement prior to Griffin. A hearing was had, and the decision of the local officers was in favor of Griffin, and, upon appeal, your office affirmed the decision below. Further appeal brought the case to the Department, and on November 5, 1895, your office decision was reversed and the settlement of Smith upon the tract was held to be prior to that of Griffin.

On December 6, 1895, Griffin filed his verified application for a hearing, duly corroborated, addressed to your office, showing his entry and compliance with the law and his notice of the departmental decisions, and alleging among other things that since the original contest between him and Smith, the latter had not occupied, resided upon, used or cultivated the disputed tract, and for more than one year prior to said application for a hearing, had removed from said premises the shanty or house placed thereon prior to the hearing of the contest and all other improvements, had not placed any improvements thereon, and had abandoned such premises and removed from the State of South Dakota. This application asks for a hearing in order to show the abandonment of the tract in controversy by Smith and the removal therefrom of all his improvements.

This motion was transmitted to the Department and was denied January 13, 1896, for the reason that none of the matters set out therein were in issue at the hearing, or when the decision of your office was rendered.

On February 5, 1896, your office promulgated the decision of the Department, and in notifying the local officers thereof, advised them as follows:

The case is hereby closed. Smith's application is herewith returned, and you will advise him that he will be allowed thirty days within which to perfect the same, and in the event of his so doing, you will notify Griffin thereof, and allow him an opportunity to show that said Smith has abandoned the land, and is not entitled to enter the same.

In obedience to this order, the local officers refused to allow the application of Smith, the successful contestant, to enter the tract, and ordered a hearing. Smith appealed and on May 8, 1896, your office upon motion of Griffin, dismissed his appeal because the same was "from an interlocutory action" and directed that the hearing be proceeded with.

On May 25, 1896, the hearing was had by stipulation of the parties and before the evidence was taken, the attorney for Smith moved to dismiss the proceedings on the following grounds:

(1) The matter involved is simply one of priority of right and this has finally been settled by the Secretary of the Interior in favor of said Francis A. Smith and cannot again be tried in this proceeding;

(2) The said claimant George A. Griffin was never required to establish or maintain his residence on said land after the hearing in the local office;

(3) The said Francis A. Smith was never required after the hearing to continue his residence and improvements; and

(4) No contest will lie against an adjudicated and finally determined priority of right to make entry on a tract of public land.

This motion was denied by the local officers and the hearing proceeded, at which no evidence was offered on behalf of Smith.

Thereafter, the local officers found that Smith had abandoned all his rights to the tract, and that the homestead entry of Griffin should remain intact and so recommended, and upon appeal, your office, on January 5, 1897, affirmed this decision and the entry of Griffin was held intact.

Smith appeals.

The order granting a hearing by your office was purely interlocutory in its nature and was not appealable. Such orders will not be reviewed unless an abuse of discretion is clearly shown, as they rest largely within the discretion of your office. (*Olney v. Shyrook*, 9 L. D., 633; *Horn v. Burnett*, 9 id., 252; and *Samuel J. Bogart*, 9 id., 217.)

But it is contended that the decision of the Department upon the motion for the hearing was final and precluded another hearing thereon.

The reason for the denial of such motion was because the matters alleged therein were not in issue at the original hearing. It is apparent that this motion for a hearing was considered as a motion for a rehearing, upon the new matter set up therein, which would not be reviewed on appeal. Such was the departmental decision because its appellate jurisdiction had been invoked and in the exercise thereof, matters foreign to the original inquiry involved in the appeal would not be considered.

Your office granted the hearing in the exercise of its original jurisdiction, and not alone upon the motion, but independently thereof as the language of the order indicates, for it directed the local officers to allow Griffin, the unsuccessful entryman, the opportunity to show that Smith had abandoned the land, at the time the latter attempted to perfect his entry.

This action of your office was to cause a further inquiry to be had in the nature of a new contest to determine questions arising since the hearing of the original contest, and did not attempt to vacate or set aside any action of the Department or to pass anew upon the questions there decided. The application for the hearing, it is true, presented the same grounds that were urged against the allowance of Smith's application to enter the land, yet these questions were not passed upon by the Department when the decision was rendered holding that Smith was the prior settler, upon the original appeal from your office decision. The case of *Grothjan v. Johnson* (16 L. D., 180), cited for contestee, has no application to this case, for in that case the Department declined to order a hearing on the ground of newly discovered evidence because

the affidavits submitted did not disclose that the evidence was newly discovered. In the case at bar, the hearing was denied solely upon the ground that the matters presented were not involved in the issues at the original hearing, and not because such showing was insufficient.

While it has become a well-settled rule that a matter once in issue and adjudicated may not be litigated again (*Parcher v. Gillen*, 23 L. D., 485-488), the grounds of the motion for a hearing in this case were not passed upon by the Department nor deemed insufficient, but were considered as not pertinent to the questions presented on appeal and involved in the original hearing.

The evidence at the hearing ordered by your office to determine the abandonment of the claim consists of the direct and cross examination of the witnesses for Griffin, as Smith appeared by counsel and offered no evidence. It clearly establishes the abandonment of the tract by Smith and his removal from the vicinity of the land. His shanty or house on the land was sold and removed from the land. His declarations made upon the eve of his departure from the locality with his family and household goods to the witnesses were that he intended to go "to a better country." Referring to the dispute over the tract, he informed Griffin, his adversary, that he, Smith, had been beaten twice, thought "there was no show for him," and was satisfied with the disposition of the case. He stated to others that he had left his claim, cared nothing for it, and so far as he was concerned, Griffin was welcome to it. These statements were made prior to the departmental decision in his favor and while the case was pending on appeal.

But, it also appears that Griffin, having obtained a leave of absence, left the tract, and did not return, after the final decision in favor of Smith was communicated to him. However, he left his improvements upon the land and maintained a constructive possession thereof by cultivating the tract with the aid of others after such final adverse decision.

It is contended that neither of these parties was compelled to remain upon and improve the land during the pendency of the former case where the priority of settlement was at issue, and the cases of *Jones v. Kennett* (6 L. D., 688) and *Fletcher et al. v. Brereton* (14 L. D., 554) are cited in support of this contention. The former of these cases was, in effect, overruled by the case of *Sims et al. v. Busse* (14 L. D., 429) and the latter did not rest upon the question of priority of settlement as between the parties. It is generally held that a contestant who claims a right of entry on the ground of priority of settlement must show a compliance with the settlement laws and the establishment and maintenance of a residence in good faith. (*Foote v. McMillan*, 22 L. D., 280.) The rule as to temporary absences of a party in such a suit, during its pendency, could not be held to cover abandonment of the claim and the sale and removal of the improvements therefrom.

Both parties left the land, Griffin because before his leave of absence

expired he was notified of the final decision against him, while Smith left the tract before the final decision in his favor was rendered. The former left his improvements upon the tract, while the latter sold and caused his improvements to be removed and abandoned his claim, leaving the locality with the express avowal that he had abandoned his claim with the intention of seeking a home in another and distant locality and that he would not return.

It appears that Griffin did not return to the tract because of the adverse decision, but still asserted his rights after Smith had abandoned the tract, and asked to have this inquiry at bar instituted. His excuse for his absence from the land is undoubtedly sufficient, while the absence of Smith was a permanent abandonment of the tract, evinced by the sale and removal of his improvements, his departure from the locality with the intention to remain, and the express renunciation of his rights to the tract.

The decision of your office is affirmed.

NORTHERN PACIFIC R. R. CO. ET AL. *v.* ST. JOSEPH ROMAN CATHOLIC MISSION.

Motion for review of departmental decision of July 12, 1897, 25 L. D., 317, denied by Secretary Bliss October 15, 1897.

TIMBER CUTTING—APPLICATION FOR PERMIT.

STEAM THRESHER AND MILLING COMPANY.

Applications for more than a second permit, by the same applicant, to cut timber from the public lands will not be considered by the Department.

Secretary Bliss to the Commissioner of the General Land Office, October 18, 1897. (A. M.)

I have at hand your letter of the 14th instant submitting the application of the Steam Thresher and Milling Company for a permit to cut timber from two half sections of unsurveyed non-mineral public lands in Idaho, under the act of March 3, 1891, 26 Stat., 1093.

Your letter states that the company has been heretofore granted three successive permits, under which it has cut upwards of 2,000,000 feet of timber and over 300,000 shingles.

In submitting the application you have adverted to the decision of the Department on June 5, 1897, in case of Riley G. Clark, 24 L. D., 504, wherein it was held and directed that applications for permits to cut timber be confined to one quarter section and that

no applicant shall be accorded a second permit unless it satisfactorily appears that a most urgent necessity exists therefor.

You state that you construe the ruling as to granting a second permit to mean that,

while the advisability of granting a second permit will be considered, yet, it was not in contemplation to consider extending, in any instance, the privilege of more than a second permit.

You have accordingly recommended that this fourth application be denied and that you be given such advisory instructions as will cover all cases of applications for more than a second permit.

In answer you are advised that the decision referred to was rendered after a careful consideration of the subject and the limitation of the area was stated to have for its object,

the restriction of the free privilege to the needs of the communities and to guard against the liability of the use of the privilege for speculative purposes.

Under this decision and in accordance with your recommendation this application for a fourth permit is hereby denied and you are further advised that the spirit and intention of the decision precludes the consideration of applications for more than a second permit under any circumstances.

The application is returned herein.

OKLAHOMA LANDS—SETTLEMENT RIGHT—SECTION 452 R. S.

HOSKIN *v.* CUPPAGE.

The law requires that residence must be established within a reasonable time after settlement where there is an adverse claim, and what is a reasonable time must depend upon the facts in each case.

A settler on lands in the Cherokee Outlet who on the day of opening makes the run from the Chilocco Indian School reservation is not disqualified thereby.

A blacksmith hired to work at his trade by the Commissioner of Indian Affairs on an Indian School reservation is not, by such employment, disqualified under section 452 R. S., to enter public lands.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) October 20, 1897. (C. J. W.)

October 7, 1893, Lizzie H. Cuppage made homestead entry, No. 1710, for the NW. $\frac{1}{4}$ of Sec. 10, T. 28, R. 2 E., Perry, Oklahoma.

November 8, 1893, Joseph Hoskin filed affidavit of contest against said entry, alleging settlement prior to the entry of defendant and prior to any settlement made by her or any other person.

A hearing was ordered between the parties, and was finally had on June 6, 1895, with both parties present and represented by counsel. On June 17, 1895, the local officers, before whom the case was tried, rendered their joint decision, in which they found that contestant was qualified to make entry, that he was the first to enter upon and claim the land for a homestead, and that his settlement was prior to any set-

tlement made by defendant and prior to her entry, and they recommended the cancellation of defendant's entry and that plaintiff be allowed to make entry.

From this decision defendant appealed, and on February 12, 1896, your office affirmed the decision of the local officers and held defendant's entry subject to plaintiff's prior right of entry.

On February 29, 1896, defendant filed a motion in the local office for review of your office decision, which showed service of the motion on plaintiff. The motion alleged errors both of law and fact.

On April 23, 1896, upon a re-examination of the record, your office denied the motion on all the grounds stated, and adhered to the original decision.

June 3, 1896, defendant filed an appeal to the Department from your office decisions of February 12, and April 23, 1896, in which the same grounds of error alleged in her motion for review are insisted upon, and the additional one that plaintiff was disqualified by reason of being at the time of his settlement an employe of the Interior Department. The other grounds of error alleged will be first considered.

In reference to the facts, the register and receiver find as follows:

On the 16th day of September, 1893, the contestant entered the Cherokee Outlet from the hundred foot line running south of the Chilocco school reservation, and ran a straight line south to the land in controversy on horseback. He stuck a stake, dug a small hole, and remained on the land until after sundown. The stake was from two and a half to three inches wide, and about three feet wide (high) having written on it, "This claim taken by Joe Hoskin." He returned to the land on the 18th of September, and did some breaking, seventy to eighty feet long, and twenty-five or thirty feet wide. He returned home at night to the Chilocco reservation, where he had lived for several years prior to the opening of the Cherokee Outlet. The week following the opening he was on the land every day. He was unable to remain on the land at night, by reason of the ill health of his wife. On October 14th he built a shanty eight by ten, six feet high on one side, and eight feet high on the other. About the first of November he had about three acres broken. During the winter was on the claim every week, with the exception of two weeks, his visits usually being made thereto on Saturdays and Sundays. At this time the contestant still retained his position at the Chilocco reservation as blacksmith, and resided at the same place. He built another house the latter part of February or the first of March; bought lumber and building material to the extent of over a hundred dollars worth some time in January, in Arkansas City, where the house was being constructed. He moved in the house on the 14th of March, 1894. The contestant claims that on account of the ill health and extreme debility and weakness of his wife, by reason of having been confined about the first of September, 1893, he was unable to remove her to the claim. And that he was unable to build a suitable house to live in before March, by reason of the failure of an Arkansas City Bank, in which his money was deposited. Since taking up his residence, he has, at different times, made such improvements, until now he has about forty-eight acres broken, fourteen acres in wheat, and six acres in oats, twelve in kaffir corn, six in cane, and ten acres in orchard. The second house is sixteen by twenty-four, six windows, and two doors, ten feet ceiling. Has a stable eleven by twelve. The first house placed on the land he converted into a chicken house. Has a cave, a good well, and a corral 150 square. Has one hundred and seventy-four peach trees, one hundred and sixty apple, plum and cherry trees, seventy-four grape vines, etc. The contestant

declares that the improvements placed upon the land until the 7th of October, 1893, were plainly visible to any person from any point of the claim, and that parties looking for evidences of settlement could not have failed to see them. It also appears that on the 18th of September, 1893, the contestant placed on the land in controversy a foundation, estimated to be eight by ten feet, made out two by six scantling, laid in the form of a square, with cross pieces or cleats nailed across the corners; and that this was placed on a sod pile about one foot high.

So far as the testimony in this case shows, the defendant relies upon her entry.

Your office substantially concurred in this finding of facts, both upon the first and second examinations of the record. Its re-examination here discloses no error in the statement of facts.

So far as appears from the record the defendant never saw the land until some time after her entry, but the law charges her with notice of the plaintiff's improvements shown to be plain and visible upon it, both before and at the time of her entry.

It is insisted that plaintiff manifested bad faith in so long delay in establishing residence. The law requires the establishment of residence within a reasonable time where there is an adverse claim, and what is a reasonable time must depend upon the facts and circumstances of each case.

The plaintiff established residence in this case within six months from settlement and before the defendant made any improvements, or went upon the land. The reason given for the plaintiff's delay in establishing residence is the ill health of his wife at the time, which is shown by the testimony of two physicians who treated her. Under the circumstances disclosed by the record, this delay will not raise the presumption of the abandonment of his settlement rights, the evidence showing that he continued to make valuable improvements up to the time of establishing residence.

It is further insisted that inasmuch as plaintiff had for some years resided on the Chilocco school reservation, and made the run from said reservation, that he was disqualified.

This contention is based on the idea that the entering upon or passing over an Indian reservation was unlawful. In the case of *Welch v. Butler* (21 L. D., 369,) it was held that the doctrine was not applicable to the Chilocco school reservation. In *Grady et al. v. Williams* (23 L. D., 533,) it is declared that persons who made the run into the Cherokee Outlet were not disqualified because they passed over an adjacent Indian reservation.

It remains to consider the contention that Hoskin is disqualified as an entryman by reason of being an employe of the Department of the Interior.

Hoskin's own testimony is relied upon to show his residence and employment on the Chilocco school reservation. He testified that he had resided at the school for seven or eight years, and was employed as a blacksmith; that he was employed at \$50.00 per month, and was subject to dismissal at any time. His employment was recommended

by the Superintendent and approved by the Commissioner of Indian Affairs.

Section 452 of the Revised Statutes is as follows:

The officers, clerks, and employees in the General Land Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

The Department in construing this section has held that it applies to clerks and employes in any of the branches or arms of the public service under the control and supervision of the Commissioner of the General Land Office in the discharge of his duties relating to the survey and sale of the public lands, and that such employes may not enter public lands. *McMicken et al.*, 11 L. D., 96.

A blacksmith hired to work at his trade by the Commissioner of Indian Affairs at the Chilocco school reservation is not an employe of the General Land Office within the meaning of said section, and is not by reason of such employment disqualified to enter public land.

The defendant having failed to show any material error in your office decisions appealed from, they are hereby affirmed.

PRACTICE—APPLICATION TO ENTER—ORDER FOR HEARING.

GALLUP *v.* WELCH ET AL. (ON REVIEW).

No right is secured by an application to make entry that will bar the allowance of a hearing, as to the status of the land involved, on the prior application of another party.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) October 20, 1897. (F. W. C.)

With your office letter "K" of September 24, 1897, was forwarded a motion, filed on behalf of Wesley C. Welch, for review of departmental decision of July 12, 1897 (25 L. D., 3), in the case of J. F. Gallup *v.* Wesley C. Welch, involving the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 36, T. 85 N., R. 30 W., Des Moines land district, Iowa.

Said case arose upon an application filed by Welch on January 22, 1889, to make timber-culture entry of the tract in question; which application was rejected by the local officers for conflict with the prior selection made by the Cedar Rapids and Missouri River Railroad Company on November 26, 1886, and also because the tract-books of their office showed the land to have been patented to the State of Iowa under the swamp act of September 28, 1850.

This land had been selected and reported by the surveyor-general as swamp land as early as May 11, 1859, and in the certificate attached to the list the surveyor-general certified that the list had been compared with the field notes, plats, and other evidences on file in this office, and by the affidavits of said county surveyors or State locating agents, it appears that the greater

part of each smallest legal subdivision of the lands embraced in said list is swampy or subject to such overflow as to render the same unfit for cultivation, and is therefore of the character contemplated by the act of 28th of September, 1850.

In a letter from your office addressed to the register and receiver at Des Moines, dated June 10, 1864, the local officers were [erroneously] advised that the tract in question had been patented to the State as swamp land under the act of 1850, and they were directed to so note upon their tract-books, which they did, and the same was duly noted upon the county records.

The tract in question is in Greene County, and as the State had conferred the swamp lands upon the county, and the county had contracted with the American Emigrant Company, said last mentioned company conveyed this land to James Callahan and James C. Savery, and they in turn conveyed it to Gallup on April 4, 1890.

This tract is within the limits of the grant for the Cedar Rapids and Missouri River Railroad Company, now known as the Iowa Central Air Line Railroad Company. In a suit brought by the American Emigrant Company against the railroad company, in 1882, to settle the question of conflicting rights between the two companies to the lands claimed to be swamp, within said county and within the limits of the railroad grant, the railroad company disclaimed any right to the tract here in question, together with other land, in consideration of which the Emigrant Company relinquished its claim to other lands claimed to be swamp within the limits of the railroad grant.

Notwithstanding this compromise in 1882, it appears that on June 30, 1885, the railroad company initiated a contest against the swamp land claim to certain tracts, including the tract in question, and at the same time filed an application to select the tract here in question as indemnity. Upon this hearing the tract in question was adjudged not to be swamp by your office letter of November 16, 1886, and on November 24th following, the company's application to select was permitted to go of record.

Subsequently, to wit, on April 11, 1892, your office canceled the company's selection because of its disclaimer filed in the suit before referred to, and on May 7, 1893, Gallup, who claimed under the swamp grant, filed a petition asking that an investigation be made or ordered to determine the character of the tract in question, with a view to having the same patented to the State as swamp land. To this application Welch, who had tendered timber-culture application, as before stated, on January 22, 1889, filed objections, and in your office decision of March 10, 1894, the petition by Gallup, and also the appeal by Welch from the rejection of his timber culture application, were considered, both of which were denied.

In the decision under review it was adjudged that Welch secured no right to the tract in question by the tender of his timber-culture application on January 22, 1889, the land being at that time embraced in the

indemnity selection of the Cedar Rapids and Missouri River Railroad Company, which selection was not canceled until after the repeal of the timber-culture law.

On account of the equities in Gallup, and in view of the fact that the contest upon which the State's selection was canceled was instituted by the railroad company after it had practically admitted the swampy nature of the land, a further investigation was ordered to determine the actual character of the land.

In said opinion the fact was noted that Gallup, in July, 1894, had tendered homestead application for this tract, upon which no action appeared to have been taken. And in the opinion it was stated:

Should the previous adjudication of your office as to the character of the land be adhered to, Gallup's application under the homestead law will then be considered and the tract disposed of as other public land.

In the motion for review filed on behalf of Welch nothing is alleged but what was fully considered at the time of the rendition of the decision under consideration, and the motion is accordingly denied and herewith returned for the files of your office.

Among the papers forwarded with your office letter of September 24, 1897, is also a motion to revoke the order for a rehearing to determine the character of this tract, filed on behalf of Oscar W. Lowery, who, it appears, in April, 1894, tendered homestead application for the tract in question, which application was rejected by the local officers June 29, 1894; from which action he duly appealed to your office.

This appeal has not been considered by your office, and in the previous decisions of this Department the pendency of said application was not mentioned. Lowery claims to have had no notice of the action taken upon the applications by Welch and Gallup until after promulgation of the decision under consideration. His claim rests solely upon his application, presented, as before stated, in April, 1894, which he asserts gives him a superior right over Gallup, whose homestead application was not filed until July following.

It will be noted that in the decision under review no direction was given to allow Gallup to make entry of the land under his application tendered in July, 1894; the action taken was upon his application for an investigation as to the character of the land; which application was filed on May 7, 1893. At this time Lowery was not a claimant for the tract in question, and by the tender of his homestead application in April following, he secured no such right as would bar the granting of the application for a hearing, and his motion is accordingly denied and herewith returned for the files of your office.

Should the tract upon re-investigation be found not to be swampy in character within the meaning of the act of September 28, 1850, the question as to the respective rights of Lowery and Gallup under their several applications will then be a proper matter for consideration.

was there held, "an application to enter should not be received during the time allowed for appeal from a judgment cancelling a prior entry of the land applied for; nor the land so involved held subject to entry, or application to enter, until the rights of the entryman have been finally determined;" and the entry of Huff was canceled and the application of Cowles to enter was allowed.

This disposition of the case was made after a consideration of the question at issue, and no good reason appearing for disturbing the same, it is adhered to and the motion for review is denied.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

COPE *v.* BRADEN.

A settler on Oklahoma land, who on the day of opening enters the Territory prematurely, with many others, through a misapprehension as to the signal given for entrance, must show, as against one who enters at the proper time, that no advantage was gained by such premature entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(F. L. C.) October 21, 1897. (P. J. C.)

The land involved in this controversy is the SE. $\frac{1}{4}$ of Sec. 12, T. 22 N., R. 7 W., I. M., Enid, Oklahoma, land district, of which Landa H. Braden made homestead entry September 21, 1893. On September 30th following, Otho E. Cope filed his affidavit of contest against the same, alleging prior settlement on the land. A hearing was had before the local officers, and as a result they filed dissenting opinions. In the opinion of the register the testimony of the several witnesses is quoted at some length, and he recommends that the homestead entry of Braden be held intact and the contest be dismissed. A motion for review of this decision was filed by Cope, but was overruled by the local officers. The receiver, in a comparatively brief decision recommends that the homestead entry be canceled and Cope be allowed to make entry.

Both parties appealed, and your office, by letter of March 6, 1896, reversed the decision of the register and held that Cope was the first to reach the land, that he was a qualified entryman and had a superior right of entry to that of Braden. In deciding the question involved, your office held:

The burden of proving that the plaintiff made a premature entry in the territory devolved upon the defendant, and he has failed to show, by a fair preponderance of evidence, that the plaintiff did start in the race before the signal was given by the soldier above mentioned.

Motion for review of this decision was filed and denied on May 18, 1896. In that decision it is held by your office:

The evidence tends to show and by a preponderance does show, that the plaintiff entered the territory a few minutes prior to 12 o'clock noon, central standard time, September 16, 1893, but under the facts of this case, such entrance was lawful. He

entered the territory with thousands at a signal given by one in authority to designate the time when 12 o'clock noon should arrive. Whether the signal was given a few minutes prior to 12 o'clock noon, it is not pertinent to inquire, so far as the qualification of the plaintiff is concerned.

Whereupon Braden prosecutes this appeal, assigning numerous errors of law and fact.

The land in controversy is situated less than one mile from the town of Enid, and is about seventeen and a half or eighteen miles north of the south line of the Outlet, from which point both parties to this controversy ran on horseback. The decisions of the register and of your office find that Cope prematurely entered the Outlet on the day of the opening. There is no doubt in my mind as to the correctness of this finding. The receiver in his opinion does not controvert this finding, but says Cope went in on the signal.

It is shown by the testimony that there were several thousand people assembled on the south line of the Outlet at a point a few miles north of Hennessey, where the railroad enters the Strip, and that the line of intending settlers extended both east and west of said railroad track where they were congregated on the one-hundred-foot strip, on the morning of the 16th of September, preparatory to making the run.

The parties to this controversy were west of the track, Cope being about one-eighth of a mile from it, while Braden was still further west and across Buffalo Creek. On this creek there was quite a growth of timber, which prevented those west of it from seeing those east. In front of the north line of the one-hundred-foot strip was a line of sentries, posted by the military authorities, to give the signal for starting by firing their pieces. The line of settlers was practically solid, and Cope was in or near the front line. It appears that the railroad train, which was a little distance south of the line, after having been loaded, was moved up to within a few feet of the line preparatory to the start. In moving it up the whistle of the locomotive was sounded, and after a few exhausts of steam the great majority of those on the line broke and ran into the Outlet. The first break seems to have been made east of the railroad track, but they were immediately followed by those on the west. The testimony shows that the soldiers tried to stop them, but were unsuccessful save as to a part of them, and those who did remain were largely occupying vehicles. The great majority of horseback riders continued on in the rush. Those who were stationed west of Buffalo Creek, where Braden was, being hidden from view by the line of timber from those east, did not start until 12 o'clock.

The rush thus made started from thirteen to fifteen minutes before twelve. This is the time as fixed by the sergeant, who had charge of the sentries, and the United States marshals, who were superintending the loading and moving of the trains, all of whom were present in the vicinity and witnessed the start.

It is clear to my mind, from the testimony, that Cope was with the crowd that broke and started at that time. Neither he nor his wit-

nesses would swear that they were not present in the Outlet prior to twelve o'clock on that day, though the direct question was put to them. They all claim they saw the sentry in their vicinity lower his guidon, which they took as a signal for the start, and ran by that. But it is not difficult to understand how the sentry, seeing a solid phalanx of on-rushing settlers, may have become disconcerted and lowered his flag. Be this as it may, however, the signal for starting was understood to be the firing of a gun, and there would seem to be no excuse why, if the settlers had been misled, they should not have halted as they were ordered to do and, take their places on the line. This many of them did do, but it is not claimed that Cope or any of his witnesses did so. In fact, it is admitted that he never stopped after the start until he got to his land.

Under these circumstances it is idle to attempt to argue that those who thus started in the race did not gain an advantage over those who remained until the lawful time for starting. Under the peculiar circumstances surrounding this premature entrance, it may be that those who made it should not be held disqualified from entering land in the Outlet. There seems to have been no premeditation in making this start. It was evidently the result of a belief that the train was moving into the Outlet, and the restless mass took that as a signal for moving.

It is manifestly unjust, however, that Cope should be given the advantage he gained by this premature entry, as against one entering the Outlet at the prescribed time. That he did gain an advantage over those remaining on the line until the signal was given to start, of from thirteen to fifteen minutes, is evident. If he was the first to arrive on the land, all other things in the race being equal, he certainly had the advantage of Braden to the extent of the time he made the start in advance of the legal hour, and in my judgment he should not be allowed this advantage.

The burden of proof is upon the contestant Cope to establish the fact that he was first upon the tract in a strictly orderly way. He should have shown with some degree of accuracy the time that he arrived at the land, and under the extraordinary circumstances surrounding his entrance into the Outlet this showing should have been such as to enable the Department to determine with reasonable certainty the time of his arrival. From a critical examination of the testimony of Cope and his eighteen witnesses it is found to be impossible to ascertain the time he did arrive. He says himself that he got there at 12:42 or 12:43. But while he admits he had a watch he says he did not consult it to ascertain the exact time. None of his witnesses fix the time from actual observation, except his father-in-law who saw him a half a mile away at the time he—Cope—got off on the land—and says he then consulted his watch and it was 12.48. All the other witnesses approximate the time as being shortly before one o'clock p. m.

Whatever may have been the number of minutes after twelve o'clock

noon, that Cope got to the land, there should be added thereto the number of minutes before twelve o'clock, that he started from the south line. The evidence shows this to have been thirteen or fifteen minutes.

Braden started in the race at twelve o'clock noon, on the signal given and ran directly to the land. The testimony tends to show that he arrived there about 12:55 p. m. There is no question as to his good faith in making the start, and Cope admits seeing him on the land shortly after he got there.

In view of the fact that Braden lawfully entered the Outlet, and the further fact that Cope prematurely entered the same, as shown, together with his failure to show by a clear preponderance of the testimony that he did not gain an advantage thereby over Braden, I think his entry should be held intact and the contest dismissed.

It is so ordered and your office judgment reversed.

RIGHT OF WAY—ACT OF MARCH 3, 1891.

WILLIAM MARR.

An application for a right of way under the act of March 3, 1891, can not be approved unless it is made to appear that said right of way is desired solely for the purpose of irrigation.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 22, 1897. (C. W. P.)

I am in receipt of your office letter of August 25, 1897, submitting the papers in the matter of the appeal of William Marr from your office decision of June 29, 1897, upon his application for right of way under sections 18 to 21 of the act of March 3, 1891 (26 Stat., 1095), for his Big Creek Reservoir, Denver land district, Colorado.

By your office letter of March 12, 1897, you required the applicant to amend his certificate on the map, filed under the act of March 3, 1891, to the effect that "the right of way was desired for the sole purpose of irrigation." The applicant failing to make the required amendment, your office, by the decision appealed from, allowed him sixty days in which to amend his certificate. Whereupon the applicant appealed to the Department.

The applicant asks to be relieved from said requirement, upon the grounds that, while the right of way is to be used chiefly for irrigation, yet a declaration to the effect that it was for that sole purpose would endanger his water right under the laws of Colorado; that, as settlements that will be made along the line of the outlet will require water for domestic purposes, it is also claimed for such use; and that the applicant also desires to make use of the water for a limited period of time for manufacturing purposes, in the operation of hydraulic mining machinery, &c.

The Department, in the case of the South Platte Canal Reservoir Co., 20 L. D., 154, held that the act of March 3, 1891, restricts the purpose for which the right of way thereby granted may be used to that of irrigation, and that maps of location would not be approved where it appears that the right of way is desired for any other purpose than irrigation, and this ruling was adhered to in the case of the Chaffee County Ditch and Canal Company, 21 L. D., 63, in these words:

Unless it is stated that the sole purpose for which the right of way applied for is desired to be used is that of irrigation, the maps can not be approved, under the provisions of the act referred to.

I am unable to discover any error in the construction of said act and the consequent ruling of the Department in these cases. The reference made by the counsel for the applicant to the act of January 21, 1895 (28 Stat., 635), which grants the right of way for tram roads, canals or reservoirs to persons "engaged in the business of mining or quarrying, or of cutting timber and manufacturing lumber," can have no bearing upon the act of March 3, 1891. The act of January 21, 1895, is not an amendment of the act of March 3, 1891, but the permission provided for in the former is for a different use, and it is not necessary to consider what rights are granted by said act, as this application is made under the act of March 3, 1891. I refer also to the case of H. W. O'Melveny, 24 L. D., 560, in which it is held that the right of way acts of March 3, 1891, and May 14, 1896, which is an amendment of the act of January 21, 1895, are so different in the character of the estate granted, as well as the uses to which the right of way may be devoted, that the permission granted must rest upon one act or the other.

Your office decision is therefore affirmed.

CERTIORARI—APPEAL—RULE 48 OF PRACTICE.

WOLFE *v.* CORMACK.

An application for a writ of certiorari, on the ground that the right of appeal was lost through the fault of the applicant's attorney, must be denied, in the absence of any specific charge of fraud or collusion on the part of said attorney.

An applicant for the writ of certiorari who alleges that the Commissioner erred in not reviewing the decision of the local office under rule 48 of practice, should set forth specifically the alleged irregularity of proceeding on the part of said office, or wherein, with respect to the interest of the government, the decision of said office is contrary to existing laws or regulations.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 22, 1897. (W. A. E.)

William H. Wolfe has filed his application for an order directing your office to certify to the Department the record in the case of said Wolfe *v.* Robert S. Cormack, involving the NE. $\frac{1}{4}$ of Sec. 31, T. 29 N., R. 3 E., Perry, Oklahoma, land district.

It appears that on September 27, 1893, Cormack made homestead entry for the above described tract, and on October 7, 1893, Wolfe filed affidavit of contest alleging prior settlement. A hearing was had, and as a result thereof the local officers found in favor of the defendant. Personal service of said decision was accepted by Wolfe's attorneys on November 9, 1896, and on December 16, 1896, appeal was filed.

Motion to dismiss the appeal as not filed in time was filed by Cormack, and on May 20, 1897, your office sustained the motion, dismissed the appeal, and disposed of the case under rule 48 of practice.

Wolfe's motion for review of this action was denied by your office on August 21, 1897.

Wolfe then filed appeal to the Department, which your office declined to forward for the reason that as he had failed to appeal in time from the decision of the local officers, there was no right of further appeal to the Department, whereupon he filed the present application for writ of certiorari.

It is not denied that notice of the decision of the local officers was personally served upon Wolfe's duly authorized attorneys on November 9, 1896, and that appeal was not filed until December 16, 1896, after the expiration of the time allowed for filing appeal, but it is alleged that "your petitioner's attorneys were not only unfaithful to their trust, but your petitioner is honestly of the opinion that they got all the money they could out of him, and then deliberately sold him out."

While it is evident that Wolfe's attorneys were very negligent, it is not shown that they were guilty of fraud or collusion. His allegations to that effect are general and indefinite and seem to be based on nothing more than mere suspicion.

In the case of *Peacock v. Shearer's Heirs* (19 L. D., 211-214), it was said:

It would be a fruitless undertaking in the Department to attempt to relieve litigants before it of all the errors, real or imaginary, that they might conclude their attorneys had been guilty of, and in the absence of specific charges of fraud it can not do so.

The plaintiff further appeals to the supervisory power of the Secretary on the grounds that the decision of the register and receiver was so contrary to existing laws and regulations, as shown on the face of the papers, that it was the duty of the Commissioner of the General Land Office to go into the merits of the controversy; that had this been done your office decision would undoubtedly have been in his favor; and that the failure of your office to go into the merits of the case and render decision in his favor is an injury and wrong to him.

Rule 48 of practice provides that:

In case of a failure to appeal from the decision of the local officers, their decision will be considered final as to the facts in the case and will be disturbed by the Commissioner only as follows:

1. Where fraud or gross irregularity is suggested on the face of the papers.
2. Where the decision is contrary to existing laws or regulations. * * *

It is not specifically pointed out in the petition wherein there was fraud or gross irregularity. The trial and the decision of the local officers seem to have been regular in every respect. As to the second exception to the rule, it was held in the case of *Watts v. Forsyth* (5 L. D., 624,) that (syllabus):

The second exception to rule 48 of practice is only applicable when it appears that the decision of the local office is "contrary to existing laws and regulations," as to rights between the claimant and the government, and not with respect to the preference rights of others.

No sufficient grounds being shown for granting the application for certiorari, it is hereby denied.

HOMESTEAD ENTRY—FINAL PROOF—EQUITABLE ACTION.

THOMAS HENRY CLARKE.

The failure of a homesteader to submit final proof under an expired entry, within the time fixed therefor by an order of the General Land Office, will not preclude equitable action on said entry, where the proof is subsequently submitted, and no adverse claim exists.

Secretary Bliss to the Commissioner of the General Land Office, October
(F. L. C.) 23, 1897. (J. L. McC.)

On June 8, 1886, Thomas Henry Clarke made homestead entry for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 14, T. 36 N., R. 7 W., Eau Claire land district, Wisconsin.

The time within which final proof should be made, in order to comply with the requirements of the law, having expired, your office on two or three occasions notified him of that fact, and requested him to make such proof. Finally, by letter of October 30, 1895, your office directed the local officers to notify him that unless he offered final proof or appealed within sixty days from date of such notification, his entry would be canceled.

On May 29, 1896, the local officers transmitted to your office, and your office has transmitted to the Department, a letter from said Clarke, addressed to the Secretary of the Interior, which the writer evidently intended as an appeal. In said letter he sets forth that his health has been poor, that his poverty has prevented his paying the traveling expenses of witnesses, etc.

On June 15, 1897, he made final proof, showing that he settled and established residence upon the land before making entry thereof; that he, with his wife and children (the latter at the date of final proof numbering nine) have resided upon the land continuously; and that he has cultivated and improved the land to an extent sufficient to satisfy the requirements of the homestead law.

Your office was warranted in directing the entryman to make final proof within sixty days on penalty of the cancellation of his entry.

Such proof was not made until long after the period thus prescribed. Nevertheless, as the question is one solely between the entryman and the government, and no other person asserts any claim to the land, you are hereby directed to submit said entry to the board of equitable adjudication for confirmation, under Rule 33.

HOMESTEAD ENTRY—QUALIFICATIONS OF ENTRYMAN.

WILLIAM GRAHAM.

A homesteader will not be held to be disqualified by reason of the ownership of more than one hundred and sixty acres, where it appears that the alleged excess was held under a pre-emption entry that has been subsequently canceled.

Secretary Bliss to the Commissioner of the General Land Office, October 23, 1897. (F. L. C.) (J. L. McC.)

William Graham has appealed from the decision of your office, dated March 18, 1896, holding for cancellation his homestead entry for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 24, T. 160, R. 57, Grand Forks land district, North Dakota.

In this case, upon a hearing had as the result of a report made by a detailed clerk of your office, the local officers, and subsequently, on appeal, your office, found as a fact that Graham, at the date of making entry for the land described, was the proprietor of more than one hundred and sixty acres of land in said State of North Dakota.

It appears from the certificate of the register of deeds, etc., found in the record in this case, that said Graham was, on March 2, 1894, (the date of his homestead entry, *supra*.) the owner of three hundred and twenty acres of land; that on February 28, 1894, (one day before signing and swearing to his application for this entry) he executed a deed purporting to convey said three hundred and twenty acres to his son, Isaac Graham; that said deed was not placed of record, for the reason that the taxes on the land so conveyed were due and unpaid (payment being, under the laws of the State, necessary before registration of such instruments); and that, as late as September 26, 1894, (according to a reliable certified abstract) the title to said three hundred and twenty acres of land was still in the name of said William M. Graham.

Your office decision finds that said instrument was not a *bona fide* conveyance, but a mere subterfuge for the purpose of evading the law, and qualifying himself, in a technical but fraudulent manner, to make the homestead entry now in dispute.

Said deed purported to convey to said Isaac Graham the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 17, T. 160 N., R. 59 W., containing 320 acres, "more or less."

By decision rendered of even date herewith, the Department directed the cancellation of said Graham's pre-emption cash entry, made January 8, 1894, for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 8, and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 17, in said township and range—the same never having been earned by him by compliance with the requirements of the pre-emption law.

The land last above described embraces one hundred and sixty acres of the three hundred and twenty acres described in William Graham's said deed to Isaac Graham. The former, therefore, at the time he executed said deed purporting to convey three hundred and twenty acres, was in fact the lawful owner of only one hundred and sixty acres. It therefore becomes unnecessary in this opinion to pass upon the question whether said deed was a *bona fide* conveyance or not. In either event, he was not disqualified to enter a quarter section of land under the homestead law.

The decision of your office holding that he was disqualified for the reason above stated is therefore reversed, and said entry will remain intact, subject to compliance with law.

MINING CLAIM—FIRE CLAY—RAILROAD GRANT.

ALLDRITT *v.* NORTHERN PACIFIC R. R. Co.

Land chiefly valuable for its deposits of fire clay is subject to location and entry under the mining laws of the United States, and is included in the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) November 6, 1897. (W. A. E.)

The land here involved, viz., the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 27, T. 3 S., R. 7 E., Bozeman, Montana, land district, is within the primary limits of the grant of July 2, 1864 (13 Stats., 365), to aid in the construction of the Northern Pacific Railroad and was listed by the company on July 8, 1891.

It appears that the commissioners appointed under the act of February 26, 1895 (28 Stats., 683) to examine and classify mineral lands in the states of Montana and Idaho, returned this tract as non-mineral in character.

On October 5, 1895, Isaac Alldritt filed a protest against the classification and listing, alleging that he had discovered on the land a valuable deposit of fire clay and had located a portion of the tract as a mining claim for this deposit on July 11, 1895.

A hearing was ordered on this protest and set for January 20, 1896, but at the request of the railroad company it was postponed to February 28, 1896. On the latter named day the protestant appeared and submitted testimony, but the company made default. As a result of

the hearing the local officers found the land to be more valuable for mineral than for other purposes and recommended that the listing be canceled to the extent of the conflict.

Subsequently the railroad company filed an application to reopen the case, and the local officers being in doubt as to whether they had jurisdiction to grant the same, forwarded the motion to your office for instructions. Your office called for the entire record, which was forwarded, and considered the matter of the protest on its merits without passing upon the question as to whether the case should be reopened.

It was held by your office, under date of October 2, 1896, that fire clay did not fall within the meaning of mineral lands so as to exclude land containing this deposit from the operation of the grant to said company.

From this decision the protestant has appealed.

At the request of your office this case has been advanced and made special for the reason that it involves an important question which should be settled.

The question is, whether fire clay is a mineral within contemplation of the exceptions to the grant to the Northern Pacific Railroad Company, excluding therefrom "mineral lands."

In the recent case of *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.* (25 L. D., 233), it was held that whatever is recognized as a mineral by the standard authorities, whether of metallic or other substances, when found in the public lands, in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, must be treated as coming within the purview of the mining laws; and further, that lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws, are "mineral lands" within the meaning of that term as used in the exception from the grant to the Northern Pacific Company for railroad purposes, and to the State for school purposes.

The deposit in that case was marble instead of fire clay as in the case at bar, but the reasoning applies fully to the present case. On the authority of said decision, therefore, it is held that land valuable for its deposits of fire clay is subject to location and entry under the mining laws of the United States, and is included in the exception of "mineral lands" from the grant to the Northern Pacific Railroad Company.

This raises the question, then, as to whether the tract here involved is more valuable for mineral than for other purposes.

As stated above, the hearing was *ex parte*, the railroad company making default.

In its motion to reopen the case the company alleges that an agreement was entered into between J. H. Scales, a special agent of the General Land Office, representing the government, and Tom Cooney,

the attorney for the Northern Pacific Railroad Company, to postpone the hearing to April 16, 1896; that the said special agent wished to examine the tract and this could not be done until the snow was off the ground; and that owing to a multiplicity of duties the said special agent overlooked the important matter of notifying the local officers of the agreement for postponement.

It does not appear that Alldritt, or his attorney, was consulted or notified in any way of this agreement to postpone the hearing. The register and receiver had appointed a time for the hearing and notified the parties. Alldritt appeared at that time and submitted testimony. It would be unjust to him to put him to the expense of another hearing on account of an agreement for postponement that neither he nor his attorney knew anything about. The hearing was regular in every respect, was had at the time appointed by the local officers, and as the company does not make a sufficient showing to warrant the reopening of the case, the motion is denied.

It appears from the testimony that the land involved is rocky and wholly unfit for agricultural purposes; that there are not more than two acres of grass growing land thereon; that it is underlaid with fire clay of a superior quality, which crops out in various places; and that the land is more valuable for mineral than for other purposes.

Your office decision is accordingly reversed and the company's list will be canceled as to the land here involved.

MINING CLAIM—OIL LANDS—RAILROAD GRANT.

UNION OIL COMPANY (ON REVIEW).

Lands chiefly valuable on account of the petroleum deposits contained therein are of the character subject to entry under the mining laws, and are not subject to selection as indemnity under a railroad grant wherein "mineral lands" are excepted from the operation of the grant.

Under the mining laws of the United States but one discovery of mineral is required to support a placer location, whether it be of twenty acres, by an individual, or of one hundred and sixty acres, or less, by an association of persons.

The case of *Ferrell v. Hoge et al.*, 18 L. D., 81, overruled.

The Southern Pacific R. R. Co. is not entitled to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) November 6, 1897. (A. B. P.)

This is a motion for review of departmental decision of August 27, 1896, in the case of the Union Oil Company (23 L. D., 222). The motion has been duly entertained, and properly matured for consideration.

On January 16, 1894, the Union Oil Company made mineral entry No. 140, covering 78.82 acres of land, situated partly in section 1, T. 4 N., R. 20 W., and partly in section 6, T. 4 N., R. 19 W., Los Angeles,

California, and known as the Central Oil Mine. That portion situated in section 1, was, on October 3, 1887, selected by the Southern Pacific Railroad Company, as indemnity, under its grant of March 3, 1871 (16 Stat., 573-9), per list No. 25.

By direction of your office, under date of May 19, 1894, the railroad company was allowed sixty days, upon notice, to show cause why its selection should not be canceled, and the mineral claimant was

required to show a discovery of a valuable deposit of mineral for each twenty acre tract, or fractional part thereof, contained in said Central Oil placer, the evidence of such discovery to consist of the affidavits of two or more persons.

From this action the mineral claimant appealed. The railroad company, in answer to the rule upon it, filed a paper in the nature of a protest against the cancellation of its selection, alleging that lands containing petroleum are not "mineral lands," within the meaning of that term as used in its grant.

In the decision complained of it was held, in substance and effect:

1. That lands containing petroleum are not subject to location and entry under the mining laws;

2. That such lands do not fall within the meaning of the exception of "all mineral lands" from the grant to the railroad company; and

3. That even if such lands were subject to location and entry under the mining laws, the discovery of mineral on each twenty acres of the claim, is a legal prerequisite to a valid location.

The errors assigned in the motion for review need not be given in detail. It is sufficient to say that, in effect, they deny the correctness of the several holdings of said decision. The further claim was made in the argument of counsel, that the entry here involved, in the event the principles of said decision are adhered to, should be held as confirmed by the act of Congress of February 11, 1897 (29 Stat., 526); and that independently of the mineral question, the railroad company possesses no right of selection under its grant, as to the lands in section 1.

A number of cases, involving substantially the same questions raised by the motion, were decided by the Department about the same time or shortly after the decision in this case was rendered, and in each case the ruling was based upon that decision. Motions for review have been filed in all the cases, and it is represented that large and valuable interests are dependent upon the conclusion to be finally reached. The questions presented are purely questions of law. There appears to be no dispute as to the facts. In view of the allowance by the local office of the mineral entry, and in the absence of any showing to the contrary, it will be assumed that the lands are chiefly valuable for the deposits of petroleum they contain, and that in this respect the entry was regular, if such lands are subject to mineral entry at all.

Upon this question the theory of the decision complained of appears to be that only lands containing metallic minerals, such as gold, silver, cinnabar, lead, tin, copper, and deposits of like nature, were within the contemplation of Congress in the enactment of the mining statutes,

and in making the exception of "all mineral lands" from the grant to the railroad company; that though scientifically speaking, petroleum is a mineral, yet it is not such a mineral as will render lands containing it, and chiefly valuable on account thereof, subject to entry under the mining laws, or exclude them from the grant to the railroad company. It is insisted by the mineral claimant, both as a matter of original construction, and in view of the uniform practice of the Land Department for over twenty years in permitting oil lands to be entered and patented under the placer mining laws, that said decision is wrong and should be revoked.

The provisions of the mining statutes, as at present codified from the act of May 10, 1872 (17 Stat., 91-2), and other acts on the subject, are to be found in the Revised Statutes, sections 2318 to 2352, inclusive.

Section 2318 provides that:

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Section 2319 provides that:

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Sections 2320 to 2328, inclusive, prescribe rules and regulations to govern the location of "mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," and provide the manner of obtaining title from the government for such mining claims.

By section 2329 it is provided that:

Claims usually called "placers", including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims.

It is under this last section that the application for patent by the mineral claimant is preferred.

The first departmental circular on the subject of the mining laws, was issued by Commissioner Drummond of the General Land Office, on July 15, 1873 (Copp's Mineral Lands, 61). In defining what constitutes "a valuable mineral deposit" within the meaning of those laws, the Commissioner said:

That whatever is recognized as a mineral by the standard authorities on the subject, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for purposes of agriculture, should be treated by this office as coming within the purview of the mining act of May 10, 1872.

It was further stated:

The language of the statute is so comprehensive, and capable of such liberal construction, that I cannot avoid the conclusion that Congress intended it as a general mining law, "to promote the development of the mining resources of the United

States," and to afford a method whereby parties holding the possessory right under local laws and regulations could secure title to tracts containing valuable accretions or deposits of mineral substances, except when a special law might intervene, reserving from sale, or regulating the disposal of, particularly specified mineral-bearing lands.

In answer to certain inquiries which gave rise to the circular, it was said:

I therefore reply that lands valuable on account of borax, carbonate of soda, nitrate of soda, sulphur, alum, and asphalt, as well as "all valuable mineral deposits," may be applied for and patented under the provisions of the mining act of May 10, 1872.

Following this circular, on January 30, 1875, it was held by Commissioner Burdett, that lands containing valuable deposits of petroleum may be entered under the mining act of 1872 (Sickles' Mining Laws, 491); and on March 31, 1882, Commissioner McFarland, after stating that "lands containing deposits of petroleum have been entered as placers and patented as such," held "that lands of that character are subject to entry and disposal according to the law and regulations relating to placer claims."

In the case of *W. H. Hooper* (1 L. D., 560-1881), the views expressed in the circular of July 15, 1873, were concurred in and approved by Secretary Kirkwood. And in the case of *Maxwell v. Brierly* (10 C. L. O., 50-1883), Secretary Teller, after referring to said circular with approval, held that lands containing deposits of "gypsum and limestone, . . . asphaltum, borax, auriferous cement, fire-clay, kaolin, mica, marble, petroleum, slate, and other substances," when more valuable on account of such deposits than for agricultural purposes, are subject to the operation of the mining laws.

Such are some of the reported rulings and decisions of the Land Department, made shortly after the mineral land laws became a part of the public land system, and by the officers of the government, charged with their administration. As contemporaneous and uniform interpretation, they are entitled to great consideration.

From an examination of the records of your office, which I have caused to be made, it is ascertained that ever since the circular of July 15, 1873, until the date of the decision complained of, the practice of allowing entry and patent for lands chiefly valuable for their deposits of petroleum, under the law and regulations relating to placer claims, has been continuous and uniform. Under this practice a large number of patents have been issued, and very large and valuable property interests have been acquired. Until the decision in this case, the correctness of the practice does not appear to have been questioned, and for that reason no case distinctly presenting such a question ever reached this Department. The case of the *Piru Oil Company* (16 L. D., 117) was a contest between said company as applicant for patent under the mining laws, for several "oil mine" claims, and a homestead entryman of a part of the lands embraced in the mineral locations; but no question as to whether the lands were of the character subject to

mineral entry, appears to have been discussed. The decision, which was in favor of the mineral claimant, was nevertheless an adjudication to the effect that oil lands are mineral lands subject to location and entry under the mining laws, if the requisite conditions as to value are shown to exist; otherwise the mineral locations could not have been sustained as against the homestead entry subsequently allowed. The principle, though not discussed, was necessarily involved, and the decision sustaining the mineral locations and entry, is therefore not without weight. The case of *Roberts v. Jepson*, (4 L. D., 60), was a similar contest. It was there held by Secretary Lamar that the mineral claimant had "failed to establish the character of the land as oil land, and, therefore, subject to location under the mineral laws."

Sufficient has been said to show that ever since the circular of July 15, 1873, until the date of the decision under review, the practice of the Land Department has uniformly been to allow entries under the mining laws of lands containing valuable deposits of petroleum, and that this view has obtained to such an extent that many titles to lands patented as mineral because of the valuable oil deposits contained therein, are now dependent upon it. Such having been the generally accepted view for so long a time, and extensive property rights having been acquired under the law as thus construed by the officers of the government whose duty it was to administer it, the demands of simple justice would seem to require that there should be no departure from that construction at this late day, unless called for by the clearest evidence of error, as well as the strongest reasons of public policy.

In the case of *United States v. Moore* (95 U. S., 760) the supreme court said:

The construction given to a statute by those charged with the duty of executing it is always entitled to the most respectful consideration, and ought not to be overruled without cogent reasons.

And in *Brown v. United States* (113 U. S., 568) it was held that:

In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who are called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to great respect.

These authorities are directly in point, and in view thereof, the construction in question, even though it were regarded of doubtful correctness, as an original proposition, should, in my judgment, be sustained.

It is proper, in this connection, to refer to the act of February 11, 1897, *supra*, passed soon after the decision under review was rendered. By that act it was provided:

That any person authorized to enter lands under the mining laws of the United States, may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mining claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not

yet patented, may be held and patented under the provisions of this act the same as if such filing, claim or improvement were subsequent to the date of the passage thereof.

The language of the act clearly indicates, and the debates of Congress, as well as the report of the Public Lands Committee of the House on the bill, unmistakably show, that it was passed for the purpose of restoring the practice which had prevailed in the Land Department prior to the decision under review. In the House Committee's report reference was made to that decision in connection with some of the earlier rulings on the subject, as hereinbefore set out, and *inter alia*, it was said:

Public lands containing petroleum and other mineral oils have been held and patented under the placer mining acts of the United States for many years past The bill simply provides by legislation for procedure in the entry and patenting of those lands along the lines that have been pursued in the past under the decisions of the General Land Office; so that there is no departure whatever from the procedure in the past for the development and acquirement of such properties.

This legislative action, so promptly taken after the departure from the earlier rulings and the long established practice thereunder, is significant, and can hardly be considered as less than a disapproval by Congress of the changed ruling.

Several cases were cited in the argument from the supreme court of the State of Pennsylvania, on the question as to whether petroleum is a mineral within the meaning of certain mineral reservations in contracts and deeds of conveyance between private parties. One case is quoted from quite extensively in the decision under review. None of these cases, however, involved the meaning of the word "mineral," or the term "mineral lands," as used in the public land laws, or in grants to railroad companies. They cannot be relied upon, therefore, as controlling precedents, or, in my judgment, as persuasive authority of much weight, in the decision of this case.

In the case of *Gird et al. v. California Oil Company*, decided in 1894, by the United States circuit court for the southern district of California (60 Fed. Rep., 531), certain lands containing valuable deposits of oil were involved. Each party to the controversy asserted claim under the mining laws, and the suit was to determine the right of possession. In its opinion the court said:

The premises in controversy are oil bearing lands, the government title to which, under existing laws, can alone be acquired pursuant to the provisions of the mining laws relating to placer claims.

The right of possession was adjudged to the defendant; and it will be observed that the adjudication was under the then existing mining laws, relating to placer claims. This was in entire harmony with the contemporaneous and long continued construction by the Land Department, as hereinbefore shown.

In the recent case of *Pacific Coast Marble Company v. Northern Pacific Railroad Company and State of Washington* (25 L. D., 233) the

direct question as to what are "mineral lands" within the meaning of the mining laws and the exceptions contained in railroad and other land grants by Congress, was involved. After an elaborate and exhaustive consideration of the subject, the Department there decided to adhere to the rule:

That whatever is recognized as a mineral by the standard authorities on the subject, whether of metallic or other substances, when the same is found in the public lands in quantity and quality sufficient to render the land more valuable on account thereof than for agricultural purposes, should be treated as coming within the purview of the mining laws.

And it was further held:

That lands containing valuable mineral deposits, whether of the metalliferous or fossiliferous class, of such quantity and quality as to render them subject to entry under the mining laws—that is, when they are more valuable on account of such mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

Congress, by the act of February 11, 1897, *supra*, expressly recognized petroleum as a mineral oil, and it was not disputed in the argument that the same is recognized as a mineral by the standard authorities on the subject, nor is it denied that the lands in question are chiefly valuable on account of the deposits of petroleum contained in them. They, therefore, come clearly within the principle and rulings of the case last cited, the discussion in which it is not necessary to repeat, and in view thereof, as well as of the long continued practice of the Land Department in permitting the entry and patent of oil lands as mineral, as hereinbefore set out, it must be held that they are lands of the character subject to entry under the mining laws; and for that reason the portion thereof situated in section 1, could not be legally selected as indemnity by the railroad company even if its right to select the same were otherwise conceded.

These conclusions render it unnecessary to discuss the matter of the confirmatory operation of the act of February 11, 1897, *supra*.

We are brought, however, to the further question raised in the argument: What are the rights of the railroad company under its grant, independently of the mineral question, with respect to the land in section 1? This land was within the primary limits of the grant by act of July 27, 1866 (14 Stat., 292), to aid in the construction of the Atlantic and Pacific Railroad. It is opposite the uncompleted portion of that road and was consequently included in the forfeiture declared by the act of July 6, 1896 (24 Stat., 123). It is also within the indemnity limits of the grant, *supra*, to the Southern Pacific Railroad Company.

The question as to the right of the Southern Pacific company to make indemnity selections within the forfeited primary limits of the grant to the Atlantic and Pacific has been finally determined adversely to the Southern Pacific by the supreme court in *Southern Pacific Railroad Co. et al. v. United States* (168 U. S., —), and a discussion of

any claimed rights under the railroad's selection of the land here in question is, therefore, unnecessary.

The only remaining question to be determined relates to the doctrine announced in the decision under review, following the case of *Ferrell v. Hoge* (18 L. D., 81), to the effect that the mining laws of the United States absolutely require a discovery of mineral on each twenty acres of a placer location. It is insisted that the doctrine is without just foundation in the statute, and that its application, especially in cases like the present one, would tend to subvert rather than promote the main purpose of the law (which was to encourage the development of the mineral resources of the country), for the reason that by the sinking of a discovery shaft on each twenty acres of an oil claim of one hundred and sixty acres or less, the oil in its crude state would be attracted to the several vents thus opened, instead of being drawn to the main well or working shaft of the claim—a thing said to be in all cases essential to the development and profitable working of such claims.

As shown by the statutes hereinbefore quoted, placer claims are made "subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims." On the point now being considered, the "circumstances and conditions," and the "proceedings," requisite in vein or lode claims, are, that "no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located."

This provision of the law distinctly makes discovery the basis of all vein or lode claims. There can be no legal location until there has been a discovery. It is to be observed that discovery and not discoveries is what is required on each claim before location. This requirement or condition applies to every claim whatever its dimensions, whether equal to or less than the maximum area allowed. Placer claims are declared to be subject to entry and patent under *like circumstances and conditions* and upon *similar proceedings*. The statute demands that discovery shall precede a vein or lode location, and the only demand as to placer claims, is that they shall be preferred under *like circumstances and conditions*, and upon *similar proceedings*. There is nothing in the statute requiring different proceedings in the matter of discovery on placer claims, from those required for vein or lode claims. The law is precisely the same in both cases: that no location can be made until there has been a discovery of mineral within the limits of the claim located. A placer location, if made by an association of persons, may include as much as one hundred and sixty acres. It is nevertheless a single location, and as such, only one discovery is, by the statute, required to support it. The provision in section 2331, that "no such location shall include more than twenty acres for each individual claimant," does not militate against this view. A placer location may be of a greater or less quantity of land, according to the number of persons uniting in it, the only limitations in this respect being that it shall not

include more than twenty acres for each individual, or one hundred and sixty acres, as a whole. Whatever its area, however, but one discovery of mineral within the limits of the claim is required to precede its location. If it be of twenty acres, located by one or more persons, it must be based on discovery; or, if it be of one hundred and sixty acres, by eight or more persons, it is but one location, and but one discovery is required by the statute. This was the construction given by the supreme court of Montana (1894) in the case of *McDonald v. Montana Wood Co.* (35 Pac. Rep., 608), and it seems to be in accord with both the letter and spirit of the law. In view thereof, and of what has been herein said on this point, I am constrained to hold that but one discovery of mineral is required to support a mining location under the placer laws, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less, by an association of persons. The case of *Ferrell v. Hoge et al.*, *supra*, is overruled.

This discussion and ruling is confined to the discovery required by the mining laws of the United States. It is not claimed that the case is affected by any local laws or regulations, and it is, therefore, not necessary to now consider or determine the authority of a State or mining district to make regulations governing the matter of discovery.

It follows from the foregoing that the decision under review must be and the same is hereby vacated. The mineral entry in question will be allowed to stand, and if satisfactory in other respects than those herein considered, may be passed to patent.

CONTEST—RELINQUISHMENT—INTERVENING ENTRY.

MCGREGOR v. OWEN ET AL.

Where a relinquishment is filed during the pendency of a contest, on which notice has not issued, and a third party is allowed to enter the land involved, the burden is upon the contestant to show that the charge, as laid in said contest, is well founded.

A relinquishment can not be held to be the result of a contest, where, at the date of its execution, notice had not issued on said contest, and the entryman in good faith had cured any default on his part that may have existed prior thereto.

Secretary Bliss to the Commissioner of the General Land Office, November 11, 1897. (W. V. D.) (C. J. G.)

The record in this case is as follows:

On April 20, 1892, Fernando F. Owen made homestead entry for lots 7 and 8 and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of Sec. 32, T. 12 N., R. 7 W., Oklahoma land district, Oklahoma; and on September 17 following, he relinquished the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ of said entry in settlement of a contest with an adverse claimant.

On October 22, 1892, Clarence H. McGregor filed an affidavit of contest, dated October 20, 1892, against Owen's entry alleging abandonment and failure to establish residence.

On June 16, 1893, Owen relinquished the remainder of his said entry, namely, lots 7 and 8, and Nathaniel R. Beach made homestead entry therefor. In the mean time no notice was issued nor hearing had on McGregor's contest.

On August 25, 1893, proceedings were instituted by McGregor asserting his preference right to enter the land by reason of his contest against Owen's entry, and Beach was required to show cause why his entry should not be canceled. On September 7, following, Beach filed his showing wherein it was set out that he purchased Owen's relinquishment for valuable consideration, and that his entry was made in good faith; that the charges in the contest affidavit were not true and that the records of the local office failed to show any contest against the land in question. He also filed a motion to dismiss McGregor's contest because the affidavit was premature, six months not having elapsed since the entry of Owen to date of the contest affidavit. This motion was sustained and McGregor appealed to your office, where under date of October 1, 1894, the case was remanded for a hearing.

Upon the testimony submitted the local office, on August 31, 1895, rendered the following decision:

That Beach paid Owen \$515 for his improvements and relinquishment; that there was no notation of this contest on the tract book at the time Beach examined it. It is also in evidence that Beach had heard that McGregor had filed a contest against said entry and contest docket "D" shows that said contest had been filed on October 22, 1892. Owen says that McGregor told him that he placed said contest on the records to protect the entry—in other words that the contest was "friendly"—and that he, Owen, only relinquished because he considered that he had got enough for it. McGregor denies telling Owen or others that it was a friendly contest. Owen admits that he moved into his house the 22, or 23, of October, 1892. An effort is made to contradict him by the witness Hudson, who says that he hauled Owen and his goods from El Reno to the claim on the 17th day of October, 1892; that he found Owen in El Reno about 2 o'clock that day. Hudson is very flatly contradicted by Joseph Newell who swears that he and Owen started on a hunt on the 17th day of October, 1892, at about 11 o'clock a. m. of that day and returned on the 22nd.

We think, under the evidence, conflicting as it is, that the issues are to be found in favor of the contestant.

Beach's entry was accordingly recommended for cancellation, from which decision he appealed to your office.

On April 21, 1896, your office reversed the decision of the local office, concluding as follows:

It is shown that Owen's return to the land was in good faith and that it was not in pursuance of any threatened contest by McGregor. It also appears if Owen had not reached the land on October 22, 1892, when the contest was filed, which is doubtful, that he cured his laches before any notice of contest was issued or served.

An entryman contested on the ground of abandonment can show that he had cured his laches before service of notice, and an intervening entryman can likewise show that the prior entryman had cured his laches. The foundation of any right or claim the contestant may acquire is the truth of the charge made against the entry, and the relinquishment of an entry pending a contest and the intervention of another entry does not relieve the contestant of this burden in the presence of such adverse right. There is no reason why the contestant should not be required to earn the

benefit under the 2d section of the act of May 14, 1880, and if the charge is false, or for any good reason cannot be maintained, then any claim thereunder would be an unconscionable one.

I find that McGregor has no claim to the said land either in equity or under any of the technical rulings of the Department.

There is some doubt that the contest was ever filed in good faith. However this may be, no notice was ever issued thereon or any step taken to obtain a hearing, until the entry attacked had been relinquished, and after the entryman, if he had been guilty of laches, had cured them.

McGregor has appealed to this Department, alleging as error, substantially, all the findings of your office.

As a question of law it is contended by McGregor that only Owen himself has the right to make the affirmative defense that his default was cured before notice, said defense being a personal one and not transferable. Such contention does not seem to be well made. In the case of *O'Conner v. Hall et al.* (13 L. D., 34) it was held—

An entry allowed on a relinquishment during the pendency of contest proceedings, should not be canceled in the interest of the contestant, on the subsequent successful termination of the contest, without affording such intervening entryman an opportunity to show cause why the contestant is not entitled to enter the land.

In the case at bar McGregor is not a successful contestant, while on the other hand Beach filed with the relinquishment his application to enter, which was allowed. This gave him a claim of record which could not be canceled without due process of law. In the face of this claim of record the burden was upon the contestant to sustain the charges contained in his affidavit, which were necessarily directed to the laches of the entryman. Thus Beach, as the purchaser of the entryman's relinquishment, was properly in a position to show in defence that the said entryman never abandoned the land as charged or that he had cured his laches, Beach's rights being dependent upon such showing, or rather upon the failure of McGregor to prove his charges.

The testimony in this case as to many important facts is very conflicting. Several witnesses, as set out in both the decisions below, testified that the contestant had declared that his contest was a "friendly" one brought for the purpose of protecting Owen's entry. The former relations of the contestant and entryman would seem to lend some strength to such a belief. It was shown that the contestant was employed to build the entryman's house on this land. The positive testimony of these witnesses, which was only contradicted by the entryman himself, justifies the finding of your office, namely, "there is some doubt that the contest was ever filed in good faith."

The contestant's affidavit is dated October 20, 1892, but he says that it was sworn to on the evening of October 21. However this may be the filing of said affidavit on October 22, gave the contestant a right to proceed against the entry, if exercised within a reasonable time. In this connection it is proper to state that McGregor's contest might very

properly have been dismissed for want of diligence in prosecution. No notice was ever issued thereon, and McGregor instituted proceedings for the first time on August 25, 1893, in support of his alleged preference right. It is very evident that these proceedings were induced at that time by a knowledge of Owen's relinquishment. In the case of *Luchsinger v. Grubbs et al.* (18 L. D., 366) it was said—

A contestant is bound to pursue the prosecution of his contest with all reasonable diligence, and where such rule is not observed the government may properly regard the contest as abandoned and proceed accordingly.

McGregor states that he made a partial arrangement with an attorney to attend to the matter of his contest, but that he heard nothing more from him. This can scarcely be regarded as a satisfactory explanation for failure to prosecute his contest until ten months after the same was filed.

There is some doubt as to the exact date when Owen returned to his claim. There is no doubt, however, that his said return was not induced by a knowledge of McGregor's contest. It is shown that the week prior to returning to the land he went on a hunting expedition. When on his way to the land, immediately after his return from the hunt, he met the contestant McGregor, who informed him of the contest. So far as the record shows, this was the first information he had of the contest. This fact is of considerable importance as being strongly indicative, when taken in connection with the fact of his continuous residence thereafter on the land until he relinquished, that Owen's return was in pursuance of a previous *bona fide* intention to make this land his home.

From the above it will be seen that while Owen probably was not residing on this land at the time he met McGregor, yet he was returning to said land, his action in that respect not being induced by actual knowledge of the impending contest. It is well settled, however, that compliance with the law, after contest is filed and before notice thereof is issued, will cure a prior default and defeat the contest. In the case of *Scott v. King* (9 L. D., 299) it was held—

Actual knowledge of an impending contest will not prejudice the claimant, if his subsequent compliance with law is in pursuance of a previous *bona fide* intent.

As previously set out herein evidence of Owen's intention is found in the fact, taken in connection with his future residence, that he was returning to the land before he was informed of the contest. He had six months from date of entry within which to establish his residence, and the fact that he returned at the expiration of that time can not be given any considerable weight against him in face of his subsequent compliance with law. In the case of *Brown v. Naylor* (14 L. D., 141) it was said—

A contest should be dismissed when the default is cured in good faith before the local office acquires jurisdiction in the case.

What constitutes jurisdiction in the present connection is set forth in the case of *Slayton v. Carroll* (7 L. D., 198) as follows:

Jurisdiction is acquired by due service of notice upon the claimant and if there has been no legal notice to the claimant, then there is no authority in the local office to adjudicate his rights.

A contest charging failure to establish residence and abandonment must fail, when, prior to legal service of notice thereof, the entryman has cured his laches.

No notice was issued on McGregor's contest, consequently the records of the local office failed to show service of such notice. Beach appears to have acted in good faith; he paid a valuable consideration for the improvements on this land, and in making his entry acted upon information received from the local office. There was no notation of McGregor's contest on the tract book at the time Beach examined it. Beach states that he employed an attorney to look the matter up and the said attorney reported to him that there was nothing against the land. The attorney who filed the relinquishment and placed Beach's entry of record testifies that the receiver told him that the land was clear. In the case of *Heptner v. McCartney* (11 L. D., 400) it was held in substance that the initiation of a contest, so far as the rights of the entryman are concerned must be considered as of the date of his appearance at the hearing, in the absence of actual or constructive notice.

Owen's residence on this land prior to the time of his relinquishment must be regarded as being in pursuance of a previous bona fide intent, unless it is clearly shown that said residence resulted from the actual knowledge of McGregor's impending contest. On this point the Department is of opinion that the preponderance of the evidence does not show that Owen's residence was due to his knowledge of said contest, and that he cured any laches he may have been guilty of, prior to his relinquishment.

This brings the case to a consideration of the question as to whether Owen's relinquishment was the result of McGregor's contest. Generally, when the contest has been properly brought a relinquishment has been considered to be the result thereof and not allowed to bar the preference right. But this is presumptive merely, and if the evidence leads to the conclusion that it was an independent transaction and not evidence of abandonment, it will not inure to the benefit of the contestant. The contest was filed October 22, 1892, and the relinquishment was not executed until June 16, 1893, between which dates the contestant had abundant opportunity to prosecute his charges. It already has been found from the evidence presented in this case that there is doubt as to whether the contest was brought in good faith and that there has been evident want of diligence in its prosecution; also that the entryman's compliance with law after knowledge of the contest was not the result of such knowledge, and that he had cured any laches of which he may have been guilty prior to his relinquishment. From the same evidence the Department is of opinion that the said relinquishment can not be regarded as the result of the contest. Your office decision is accordingly affirmed.

INDIAN LANDS—APPROVAL OF LEASES—ACT OF JUNE 7, 1897.

SISSETON AND WAHPETON INDIANS.

Under the special provisions made in the act of June 7, 1897, the Sisseton and Wahpeton Indians may lease their allotted lands for farming and grazing purposes without the supervision of the Secretary of the Interior; but leases of lands executed by said Indians for mining or business purposes remain under the general rule, and require the approval of the Secretary.

Assistant Attorney-General Van Devanter to the First Assistant Secretary of the Interior, November 11, 1897. (W. C. P.)

In response to your request for an opinion upon the question "as to the present right, authority and expediency of the Department approving leases of the Sisseton and Wahpeton allottees, executed under the provisions of the act of February 28, 1891, and the acts amendatory thereof," submitted to the Department by the Commissioner of Indian Affairs in his letter of October 18, 1897, I would respectfully submit the following:

By the agreement between the United States and the Sisseton and Wahpeton Indians, accepted, ratified and confirmed by the act of March 3, 1891 (26 Stat., 989-1035), the Indians sold to the United States all the unallotted lands within their reservation remaining after allotments provided for in article four of said agreement should have been made. In said article four it was agreed that there should be allotted to each individual of said bands a sufficient quantity of land which, with the lands theretofore allotted, should make in each case one hundred and sixty acres. In the act of approval (Sec. 29) the Secretary of the Interior was authorized and directed to cause the additional allotments provided for in said agreement to be made in the manner and as provided in the act of February 8, 1887 (24 Stat., 388), and acts amendatory thereof.

Said act of 1887 provided for the allotment of lands in severalty to the various Indian tribes in the discretion of the President, for the issuance of a patent, declaring that the United States does and will hold the land in trust for the allottee and his heirs for the period of twenty-five years, and will then convey it in fee "free of all charge or incumbrance whatsoever" and also as follows:

and if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void.

The amendatory act of February 28, 1891 (26 Stat., 794), modified the original act in several particulars, but the only part thereof necessary to be noticed here is that relating to leasing allotted lands, which reads as follows:

That whenever it shall be made to appear to the Secretary of the Interior that by reason of age or other disability, any allottee under the provisions of said act, or

any other act or treaty cannot personally and with benefit to himself occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary for a term not exceeding three years for farming or grazing, or ten years for mining purposes.

The Indian appropriation act of August 15, 1894 (28 Stat., 286-305), contains substantially the same provision, except that leases are therein allowed "for a term not exceeding five years for farming or grazing purposes or ten years for mining or business purposes." This provision of the act of 1894 is found in the same words in the appropriation act of March 2, 1895, (28 Stat., 876-900), and also in that of June 10, 1896 (29 Stat., 321-340). In the act of June 7, 1897 (30 Stat., 62-84), the same provision is found, except that the terms are reduced to three years for farming or grazing purposes and five years for mining or business purposes. These citations embrace the general provisions as to the leasing of allotted lands.

The provision as to the Sisseton and Wahpeton allottees under which the question now presented arises, is found in the said act of June 7, 1897 (30 Stat., 62-75), and reads as follows:

That the Sisseton and Wahpeton Indians are hereby authorized to lease their lands or any part thereof for a term not exceeding three years for farming or grazing purposes.

This is a special provision as to these Indians, differing from the general provision as to all Indians, found in the same act. After a discussion of the effect of special and general provisions, either of which would include the matter under consideration, the following rule is laid down in *Endlich on the Interpretation of Statutes* (Sec. 216):

Hence if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision—it must be taken that the latter was designed as an exception to the general provision.

The effect of a special provision upon a general one, and the extent to which it is to supersede it, is a question of legislative intention not always easily determined. In this case the special provision differs from the general in that it does not limit the right of leasing to those allottees who "by reason of age or disability" cannot personally and with benefit to themselves occupy or improve their allotments, and in that it does not specifically provide that the leasing shall be in the discretion of the Secretary of the Interior, or under terms, regulations and conditions to be prescribed by him. It is clear that it was the intention to allow all these Indians, without regard to disability, to lease their lands for farming or grazing purposes. It has been the general policy to place the leasing of lands under the supervision of the Secretary of the Interior, and it might be contended with some reason that an intention to depart from that rule in any case would have been asserted by specific words, and not alone by the omission

from the special provision of the words of the general provision conferring such supervision.

An examination of the proceedings in Congress relating to this special provision as to the Sisseton and Wahpeton Indians removes all doubt as to the legislative intention. The bill as it originally passed in the House of Representatives did not contain any special provision as to the leasing of the Sisseton and Wahpeton lands. While the bill was under consideration in the Senate, an amendment was proposed in the following words:

Provided, That the Sisseton and Wahpeton Indians are hereby authorized to lease their lands, or any part thereof, for a term not exceeding three years for farming or grazing purposes, and at the expiration of such lease, the same may be renewed or the lands leased to any other person upon said renewal or new lease being approved by the Secretary of the Interior.

The discussion of this amendment is found in the Congressional Record, 2nd Session, 54th Congress, Vol. 29, part 3, page 2037. A question arose as to what reason there could be for requiring the approval of the Secretary of the Interior to a renewal of a lease when the Indian was allowed to make a lease in the first place without any limitation. It was stated by Mr. Pettigrew, in charge of the bill, that it had been represented to the Committee that the Indians had found it impossible to comply with the requirements of the Interior Department in making leases of their unimproved lands, and he said:

We thought it a matter of wisdom to allow the Indians to have three years without complying with the rules laid down by the Department, and after value had been given to the lands by improvements, the leases should be approved by the Secretary of the Interior.

After the explanation thus made, the amendment as proposed was adopted by the Senate. In conference between the two houses, that part of the Senate amendment after the word "purposes" was stricken out, and the amendment as thus amended was adopted. The provision as thus amended was included in the act which finally became a law.

It is clear that it was intended to allow these Indians to lease their lands for farming or grazing purposes without the supervision of the Secretary of the Interior. As to leases for mining or business purposes, the general rule still obtains, and the approval of such leases by the Secretary is necessary to their validity.

Approved, November 11, 1897.

C. N. BLISS,

Secretary.

PRE-EMPTION ENTRY—ACT OF OCTOBER 1, 1890.

GRAETZ v. CANNON ET AL.

A pre-emption entry can not be allowed under section 2, act of October 1, 1890, except on proof of continuous residence on the land so entered for a period of not less than three months prior thereto.

Secretary Bliss to the Commissioner of the General Land Office, November 11, 1897. (W. V. D.) (J. L. McC.)

Charles W. Seely, on November 19, 1891, made pre-emption cash entry for lots 5, 7, 8, and 9, of Sec. 6, T. 64 N., R. 3 W., Duluth land district, Minnesota, claiming it under the second section of the act of October 1, 1890 (26 Stat., 647).

On December 10, 1891, Albert F. Graetz filed affidavit of contest, charging failure to comply with the requirements of the law as to residence.

Hearing in the case was had commencing November 21, 1893, when the contestant and the transferees of the defendant appeared. As the result of the hearing, the local officers recommended the cancellation of the entry. The transferees appealed to your office, which affirmed the judgment of the local officers. Thereupon they appealed to the Department.

The record and the testimony show that Seely, on November 20, 1891, transferred an undivided two-thirds interest in the land, by warranty deed to George N. Cannon and Henry V. Holmes, for the expressed consideration of five thousand dollars. Holmes testified that the deed was given to secure a debt of forty dollars for groceries, and the money loaned by him (Holmes) to pay the purchase price of the land.

Seely, in his final proof, alleged that he settled on the land July 1, or 2, 1891, and built thereon a log house, warm and comfortable at all seasons of the year; that he had cleared one and a half acres ready for crop, and had dug a well thereon—the aggregate value of the improvements being \$250; that he had resided upon the land continuously since July 1, 1891, up to November 9, 1891, excepting a necessary absence of about four weeks to get supplies; and that he had no personal property on the premises.

The testimony relative to Seely's residence and improvements is correctly summed up in the decision of your office appealed from, and need not be recited herein. It will be sufficient to say that it shows that he was upon the land but a few days in the aggregate, and at those times occupied a tent; that the "house" which he refers to in his final proof was a shanty about four feet high, made of poplar poles, with openings four to six inches wide between the poles; with no floor; with a hole for a door and an opening for a window, but with no door or window in them; with five or six poles placed on top, and some brush laid over them, for a roof—which, as one witness says, was "not enough to shade

a man;" in this shanty there was no stove, or furniture of any kind. In short, the final proof was very largely false. In fact, the appellant does not deny that such was the fact, further than to add to the other allegations of error in the appeal the formal allegation that your office "erred in affirming the Hon. Register and Receiver's findings of fact from the testimony offered.

The above allegation, together with the allegations that your office "erred in recommending said cash entry No. 11,528 for cancellation," and that it "erred in not dismissing the contest and recommending said entry for patent," are not sufficiently specific to warrant consideration under Rule 88 of Practice.

The defendants allege that your office "erred in holding that the rule of '*caveat emptor*' was applicable to the transferees in this case." But he does not attempt to explain why the transferees in this case should be exempted from the provisions of law applicable in all other cases.

He contends that this entry should not be canceled, inasmuch as "his compliance with the law in respect to his *former claim* was established." From a careful perusal of your decision, it appears that it does not hold this entry for cancellation for failure to comply with the requirements of the law in respect to some "former claim," but for failure to comply with the requirements of the act of October 1, 1890 (26 Stat., 647), in respect to this claim—said act providing:

That no final entry shall be permitted except upon proof of continuous residence upon the land, the subject of such new entry, for a period of not less than three months prior thereto.

He contends further, that said "Sec. 2, act of October 1, 1890, was remedial, and entitled to the most liberal construction, and that claimant's residence upon said land could be made in any way in which he chose." Even if it be remedial, it is not entitled to construction so liberal as to enable entry thereunder to be made without any residence whatever, upon final proof shown to be false.

The decision of your office holding said entry for cancellation is correct, and is hereby affirmed.

RAILROAD GRANT—ACT OF JANUARY 12, 1891.

SOUTHERN PACIFIC R. R. Co.

Selections of lands for the Southern Pacific R. R. Co. in lieu of lands taken for the Mission Indians under the act of January 12, 1891, cannot be approved unless it is made to appear (1) that the company was entitled under its grant to the lands so taken, hence that such lands are non-mineral in character, and (2) that the lieu selections are of the same character; and, in securing such evidence, the departmental regulations provided for the determination of the character of lands claimed by a railroad company should not be disregarded.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 11, 1897. (F. W. C.)

With your office letter of October 5, 1897, is forwarded for approval clear list No. 43, covering 3,846.47 acres within the Los Angeles land

district, California, selected by the Southern Pacific Railroad Co. in lieu of certain tracts selected by the commissioners appointed under the act of January 12, 1891 (26 Stat., 712) for the Mission Indians. By said act it was provided that in case

any land shall be selected under this act to which any railroad company is or shall hereafter be entitled to receive a patent, such railroad company shall, upon releasing all claim and title thereto, and on the approval of the President and Secretary of the Interior, be allowed to select an equal quantity of other land of like value in lieu thereof, at such place as the Secretary of the Interior shall determine.

The selections covered by the list in question were made in accordance with the instructions contained in departmental communication of June 17, 1897 (24 L. D., 543). From the letter of transmittal it appears that the tracts selected are free from adverse claims but are all within six miles of a mineral claim; and two of the tracts selected were returned by the surveyor general at the time of the government survey December 4, 1893, as mineral land. Further, all the tracts selected by the commissioners under the act of January 12, 1891, *supra*, and made the basis for the selection under consideration, are within six miles of a mineral claim, and those in township 2 S., range 2 E., were all returned as mineral lands by the surveyor general at the time of the government survey as aforesaid.

In your office letter submitting the list, you state:

In view of the fact that said act of Congress was for the sole benefit of the Indians, and that it is optional with the company whether it shall give up the lands within its grant for that purpose, I respectfully request to be advised whether under the circumstances any examination to determine the character of the land is necessary, and if so deemed, would suggest that a special agent be detailed to make such investigation and determine the character of all the tracts selected and released.

It will be remembered that the act of 1891 provides that in case

any lands shall be selected under this act to which any railroad company is or shall be hereafter entitled to receive a patent, said company shall, upon relinquishing all claims, etc.

It becomes necessary, therefore, in the first instance, to determine whether the railroad company was under its grant entitled to receive a patent for the tracts selected by the commissioners, and to do this, inquiry must be made as to whether the lands are mineral lands, for if they are, the company would not have been entitled to receive a patent for them under its grant. As before stated, they are all within six miles of mineral claims, and a large portion of them were at the time of the government survey actually returned as mineral lands. If the company had attempted to secure patent for those lands, it would have been necessary to have published notice as required by the circular of July 9, 1894, and to have made a specific showing as to the tracts returned as mineral before they could have received patent therefor. No such showing has been made as to those lands, and it is not putting the company to an additional requirement or inconvenience by requir-

ing that such showing be now made. Without this showing it can not be adjudged, if the usual rules be followed, that such lands are lands to which the company is entitled to receive patent.

The lands now sought to be selected must be lands not mineral in character. Some of them were returned as mineral, and all as within six miles of mineral claims, and the rules in force for determining the character of such lands were adopted after careful consideration as the only safe course for the protection of miners and as putting the companies to the least expense and inconvenience possible.

The plan proposed, to direct an investigation by a special agent, in lieu of the usual proceedings under the regulations in force for determining the character of lands claimed by a railroad company, where the same had been returned by the government survey as mineral lands, or where such lands are within proximity of six miles to known mineral claims, is not approved.

The Department is not unmindful of the fact that, for the benefit of the Indians, this matter should be closed up at the earliest possible moment; but the regulations in force governing such matters should not be disregarded, especially where the change proposed will not facilitate the early determination of the matter.

Sixty days' notice is required under the regulations, but for this case, for the reason stated, it is directed that the period of publication of notice be reduced to thirty days; but otherwise, that the regulations must be strictly complied with. The list is herewith returned.

FEES—REGISTER AND RECEIVER—SECTION 2238 R. S.

CLARENCE DENNIS ET AL.

The second clause of section 2238 R. S., providing a fee to the register and receiver of one per cent on moneys received is applicable only to moneys received at cash sales of lands, and does not include money paid on account of timber depredations. The eighth clause of section 2238 R. S., fixing a fee of five dollars to the register and receiver for superintending public land sales, does not authorize the collection of such fee on the sale of an isolated tract.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 12, 1897. (C. J. W.)

On June 10, 1895, on the presentation of the quarterly account of Clarence Dennis, receiver of public moneys at Ashland, Wisconsin, your office rejected an item of one per cent commission charged by said officer on timber depredations.

On June 19, 1895, in reply to a communication from Clarence Dennis, in reference to said quarterly account, your office stated expressly that registers and receivers were not entitled to commissions on moneys received on timber depredations, and that paragraph two, Sec. 2238 of

the Revised Statutes, providing a fee of one per centum on all moneys received at each receiver's office, is not considered as applying to any moneys except receipts from cash sales.

On July 1, 1895, the register and receiver joined in a written request that your office reconsider said decision of June 19, 1895.

On August 8, 1895, in reply to said application for reconsideration of the conclusion reached in office letter ("M") of June 19, 1895, your office adhered to said conclusion.

On October 14, 1895, the attorneys for the register and receiver asked for a review of your office decision of June 19, 1895, and one of October 4, 1895. In the latter decision the question was, whether or not the purchaser at a sale of an isolated tract was required to pay the fee of five dollars per diem allowed by paragraph eight of Sec. 2238, and your office held that the purchaser was not properly chargeable therewith.

Your office, on December 4, 1895, denied the motion for review of the decisions referred to, and the register and receiver have appealed.

The appeal involves the construction of the second paragraph of section 2238 of the Revised Statutes, in reference to commission of one per cent on moneys received, and of paragraph eight of said section, in reference to per diem pay of registers and receivers for superintending public land sales. The second paragraph has been uniformly held to apply only to moneys received at cash sales of lands, this being the only fund paid into the receiver's office, at the date of the act providing said commission, April 20, 1818 (3 Stat., 466). The contention is, that it is error to consider the intention of Congress in the passage of the original act, for the reason that said paragraph has been re-enacted and the original act repealed. Section 5596, Revised Statutes.

It appears from the General Land Office instructions issued to registers and receivers, under date January 23, 1880 (C. L. O. Vol. 6, p. 195), that your office has construed paragraph two of section 2238 of the Revised Statutes, since the revision. Said circular contains the following quotation from a decision of your office, dated March 6, 1878:

Paragraph 2, Sec. 2238, Revised Statutes, providing "a fee of one per centum on all moneys received at each receiver's office," is not considered as applying to any moneys except receipts from cash sales. The fees and commissions received on other than cash sales, and the commissions paid to registers and receivers by the United States on account of cash sales, are not regarded as moneys received at the receiver's office, within the meaning of the law, on which an additional one per centum can be claimed. It is not to be presumed that the statute contemplated the allowance of commissions upon the commissions and fees already paid.

Paragraph 2 of Sec. 2238, Revised Statutes, is a literal reproduction of the act of April 20, 1818. At that period no disposals of the public land were made except for cash. Hence the law applied to cash sales only.

Since the passage of the act of 1818, the pre-emption and homestead systems have been established, together with other methods of entering and locating the public lands, and a schedule of fees and commissions especially adapted thereto has been provided. The twelve paragraphs of Sec. 2238 embrace the several classes of fees

and commissions allowed to registers and receivers. Paragraph 2 relates to cash sales. The fees and commissions on all other classes of entries and locations are particularly specified in the remaining eleven paragraphs.

In your office letter ("M") of December 4, 1895, the quotation above referred to is followed by this statement:

The uniform practice of this office since March 6, 1878, has been in conformity with the instructions just quoted, and the practice of the Treasury Department, which now audits the accounts of the registers and receivers, is also in accord with the ruling of this office in this matter.

. . . The decision contained in my letter of June 19, 1895 is in conformity to a well established practice and is sustained by a long line of precedents, both in this office and the Treasury Department, and I must therefore decline to alter it.

The supreme court in *Steamship Company v. Joliffe* (2 Wall., 450), indicates the rule to be, that revisions of the law are not to be regarded as new acts, but rather as the continuance of old ones. Since the act of 1818 seems to have been carried into the revision without substantial change, the effect of the revision as to this clause was to continue the old law, and the status at the time of the passage of the old law, as well as at the time of the revision, may be properly considered in determining its meaning. This your office seems to have done in construing the different clauses of the whole section, which all relate to compensation of registers and receivers.

As to clause eight, a similar rule of construction was adopted, and it was held that the purchaser of an isolated tract at a public sale was not chargeable with the per diem of five dollars contemplated and provided in said clause.

In the case of *Isham R. Darnell* (21 L. D., 454), it was held:

That the local officers are not entitled to collect a fee from one who purchases at a public sale land sold as an isolated tract.

As shown by your office, the interpretation placed upon these clauses is in accord with the instructions and rulings of your office long adhered to, and followed also by the Treasury Department. In such cases the rule should not be changed, unless manifestly erroneous.

In the light of the history of the legislation touching the compensation of registers and receivers, the rulings and practice of your office and the Treasury Department seem to have been within the meaning of the law, and will not be disturbed.

Your office decisions of June 19, August 8, and December 4, 1895, are affirmed.

PRACTICE—NOTICE OF APPEAL—RES JUDICATA—OKLAHOMA LANDS.

SPROW ET AL. v. MILLER.

Where a notice of appeal is served on the attorney of the adverse party, as shown of record, the right of such appellant to be heard should not be affected by the fact that said attorney was not at such time authorized to represent the appellee.

The rule of *res judicata* is not applicable to a decision denying a party the right to be heard on appeal where such decision is the result of a mistake of fact on the part of the Department.

Entering the Cherokee Outlet, on the day of opening, from an adjacent Indian reservation does not disqualify the settler.

Secretary Bliss to the Commissioner of the General Land Office, November 12, 1897. (W. V. D.) (G. B. G.)

This case is before the Department on the petition of Thomas M. Hartshorn asking that departmental decisions herein of August 4, 1896, dismissing his contest against the entry of George L. Miller, and on review December 26, 1896, reaffirming said decision, be vacated, and that his contest be reinstated.

This case is complicated with docket case number 24-479 to a degree that it has been found necessary to examine the records in both cases to a correct understanding of the question here presented. This last named case is styled the case of Frank A. McKee, Thomas M. Hartshorn, Nathan C. Hockney, Elmira R. Greason *v.* David D. Duncan.

In the case at bar the land involved is the NW. $\frac{1}{4}$ of Sec. 9, T. 26 N., R. 1 E., Perry land district, Oklahoma, and in the other case the land involved is the NE. $\frac{1}{4}$ of Sec. 8, T. 26 N., R. 2 E., same land district. These tracts of land are in adjoining sections and within that part of the Oklahoma Territory known as the Cherokee Outlet, opened to settlement and entry on the 16th day of September, 1893.

The petitioner, Thomas Hartshorn, claims the W. $\frac{1}{2}$ of the said NW. $\frac{1}{4}$ of Sec. 9 and the E. $\frac{1}{2}$ of said NE. $\frac{1}{4}$ of Sec. 8.

On September 23, 1893, George L. Miller made homestead entry for the said NW. $\frac{1}{4}$ of Sec. 9, and on March 12, 1894, David D. Duncan made homestead entry for the said NE. $\frac{1}{4}$ of Sec. 8, based on his soldier's declaratory statement, filed September 18, 1893. On November 13, 1893, Hartshorn filed an application to contest Duncan's filing, and on November 15, 1893, filed affidavit of contest against the entry of Miller, alleging prior settlement in both cases.

There were other contestants and claimants for each of the above described tracts of land, or parts of each, among whom was Henry A. Sprow, who claimed by virtue of prior settlement all of the land embraced in the entry of Miller.

Separate hearings were ordered by your office. A hearing was had at the local office in the case of McKee *et al.* against Duncan. At that hearing Thomas M. Hartshorn testified that he was at twelve o'clock, noon, September 16, 1893, on the Ponca Indian reservation.

On May 29, 1895, on motion of the contestant, Sprow, in the case of Sprow and Hartshorn *v.* Miller, the contest of Hartshorn was dismissed as to the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 9, for the reason that he entered the Cherokee Outlet on the 16th day of September, 1893, from the Ponca Indian reservation. On November 12, 1894, Miller's entry had been canceled by relinquishment, and on the same day Sprow filed

homestead application for the NW. $\frac{1}{4}$ of Sec. 9, which was suspended to await action on contest of Hartshorn. On June 26, 1895, Hartshorn appealed from the action of the local officers dismissing his contest, and on November 13, 1895, your office affirming the action of the local officers said:

It was held in the case of *Cagle v. Mendenhall* (20 L. D., 446), that such entrance was illegal and a bar to entry of lands within the Cherokee Outlet. That case governs this; therefore your decision is affirmed.

Further appeal brought the case to the Department, together with a motion to dismiss the same, filed by counsel for Sprow, alleging that the appellant had failed to serve said Sprow with a copy of the appeal as provided for by the rules of practice.

On August 4, 1896, the Department passing on said motion said:

Counsel for Hartshorn intending to serve said appeal upon contestant, Sprow *et al.*, served instead a copy of the appeal in the case of McKee, Hartshorn *et al.* v. Duncan upon the attorneys in that case; and did not discover the error and serve a copy of the appeal in the case at bar upon the attorneys in said case until after the lapse of considerably more than the sixty days prescribed by the rules of practice. Thereupon counsel for Sprow files a motion asking that said appeal be dismissed. In view of the facts set forth, the motion must be granted; the appeal is therefore dismissed.

Motion for review of said decision was filed, and on December 26, 1896, denied without discussion.

The petition now under consideration was entertained on June 21, 1897, and has been refiled with evidence of service.

It is now made to appear, by the petition and exhibits filed therewith, and more especially from the affidavit of Mr. E. Bee. Guthrie, a member of the law firm of Howe and Guthrie, that my predecessor, Mr. Secretary Smith, was in error in finding that the appeal served by Hartshorn on the law firm of Howe and Guthrie was an appeal in the case of McKee, Hartshorn, and Duncan. Mr. Guthrie states, under oath, that as a member of said firm he accepted service of the Commissioner's decision in the case of Sprow and Hartshorn v. Miller, that he accepted service in said case as attorney for Sprow, and "also accepted service for Sprow upon Hartshorn's appeal and specification of error."

It appears that neither Mr. Guthrie nor the firm of Howe and Guthrie had authority from Sprow to represent him in the premises, but the mistake was an inadvertence on their part. At the time that Hartshorn's appeal was served on them they appeared as the attorneys of record in that case, and the only attorneys of record appearing to represent the said Sprow. The action of Hartshorn, therefore, in serving them can not be held to affect him to his injury.

It is now urged by counsel for Sprow that the case is closed, that Sprow has been permitted to make an entry of the land under the decisions of my predecessor, and ask that the rule *res judicata* be invoked; and further that, inasmuch as at the time the Commissioner's decision herein was rendered on the merits of the case, the doctrine of

the case of *Cagle v. Mendenhall* (*supra*) was in full force, and that under the admitted facts of record Hartshorn was disqualified from having entered the land on the day of the opening from the Ponca Indian reservation, and that under the decisions of the Department this being a closed case, it will not be re-adjudicated under a changed construction of the law.

Ordinarily, this contention would not be without weight. But it will be remembered that this case has never been finally adjudicated by the Department on its merits. Hartshorn was denied the right of appeal on a mistake of fact, the effect of which was to deny him a hearing. Under such circumstances the rule *res judicata* can not be invoked.

In the case of *Brady v. Williams*, 23 L. D., 533, it was held that persons making the run from the one hundred feet strip set apart by the President's order around the Cherokee Outlet for the occupancy of intending settlers were not disqualified as settlers by the fact that in entering thereon they passed over an adjacent Indian reservation, and the case of *Cagle v. Mendenhall*, *supra*, was overruled.

Hartshorn was therefore not disqualified on account of his entering the strip on the day of the opening from the Ponca Indian reservation.

This case can not be decided on the record before the Department; all questions of prior settlement on the land in controversy could, perhaps, be determined from the record in the case of *McKee et al. v. Duncan*, but in the case at bar Sprow has not had his day in court.

The aforesaid departmental decisions herein are hereby vacated, and you are directed to order a hearing between Sprow and Hartshorn to determine the question of prior settlement.

DESERT LAND ENTRY—MORTGAGEE—ASSIGNEE.

THOMAS E. JEREMY (ON REVIEW).

A mortgagee who secures the foreclosure of a mortgage covering land embraced within a desert land entry, prior to the time when final proof is due on said entry, may be regarded as an assignee thereof, and entitled to submit final proof.

Secretary Bliss to the Commissioner of the General Land Office, November 12, 1897. (W. V. D.) (G. B. G.)

On September 16, 1893, one William C. Dyer made desert land entry, No. 3843, for the N. $\frac{1}{2}$ of Sec. 29, T. 1 N., R. 2 W., Salt Lake City, Utah.

On September 17, 1895, there was transmitted to your office a mortgage of said entry, dated October 9, 1893, from the said Dyer to Thomas E. Jeremy, given ostensibly to secure the payment of a note, therein set forth, for \$1500, money borrowed to improve said land. Accompanying said mortgage was an affidavit of Jeremy, in which it is set out, substantially, that he is a citizen of the United States, of legal age, and that Dyer has died without heirs. There was also transmitted a second

year's proof, submitted by Jeremy, that shows an expenditure by him of \$487 upon said entry. He prayed that he be recognized as the assignee of said entry by virtue of said mortgage.

By departmental decision of May 10, 1897 (24 L. D., 418), in said matter, it was held that, in view of the provisions of the statutes of Utah, Jeremy could not be recognized and treated by the Department as the legal assignee of Dyer's entry, but said:

If he shall by the foreclosure of his mortgage under the laws of Utah, as suggested, place himself in a position to be recognized as the assignee of Dyer, I see no just reason why he may not be allowed to submit proof under the former's entry; and if so submitted, the same will be duly considered.

A motion for review and reconsideration of this decision has been filed, in which no specific error is assigned, but it is urged in argument that inasmuch as the promissory note, for which Dyer's mortgage was given, is made payable on or before three years after its date, Jeremy can not foreclose the mortgage until after said three years have expired; that in the case of said desert land entry,

"proof must be made within the statutory period, and annual proof must be made each and every year; if this is not done, then the entry is subject to contest;" (that) "Jeremy has done everything that the law requires in the way of annual expenditures, and if recognized as the assignee stands ready to make proof and payment for the land; but he could not go into court and get a judgment within the time that proof and payment is required under the statute."

It is not the province of the Department to decide questions relative to the disposition of the public lands in advance of their orderly presentation. As a motion for reconsideration, nothing is now presented which has not already received careful consideration. A mortgagee under the laws of Utah is not an assignee of desert lands within the meaning of the amendatory desert land act of March 3, 1891 (26 Stat., 1095), under which Dyer's entry was made. The strong equities presented by the record in favor of the mortgagee induced the Department, in the decision under review, to make certain suggestions which it was thought would enable him to bring himself within the act. It was thought that the foreclosure of the mortgage would place Jeremy in position to be recognized as the assignee of Dyer, that no just reason was seen why in that event he might not be allowed to submit proof under Dyer's entry, and that if so submitted, the same would be duly considered.

By the amendatory act of March 3, 1891 (*supra*), the lifetime of a desert land entry is four years. The amendatory act differs from the original desert land act of 1877 in that it required an expenditure of one dollar per acre each year for three years, and yearly proof of such expenditure.

By the act of July 26, 1894 (28 Stat., 123), the time for making final proof and payment on all desert land entries was extended for one year beyond the time at which proof and payment were due or might there-

after fall due under existing law; and by the act of August 4, 1894 (28 Stat., 226), it was provided:

That in all cases where declarations of intention to enter desert lands have been filed, and the four years limit within which final proof may be made had not expired prior to January first, eighteen hundred and ninety-four, the time within which final proof may be made in each such case is hereby extended to five years from the date of filing the declaration.

The entry in the case at bar having been made on September 16, 1893, final proof thereon would not be required until September 16, 1898, and since the note and mortgage executed by Dyer were due and payable on October 9, 1896, it would seem that the mortgagee would have ample time to foreclose the mortgage before final proof on the entry would become due.

The Department will not at this time consider questions suggested by the motion for reconsideration, in the matter of the alleged expenditures and reclamation of the land, nor any question as to the yearly proofs of the same required by law. These it will be time enough to consider when the Department is in possession of all the facts and after Jeremy shall have become entitled to such relief as can be given an assignee under the law.

PRACTICE—MOTION FOR REVIEW—CONTESTANT—APPEAL.

LAWRENCE v. SEEGER (ON REVIEW).

The rule of practice relative to closing cases on review announced in *Allen v. Price*, 15 L. D., 424, did not contemplate its application to cases where an entry had been formally canceled prior to said decision.

A successful contestant will not be held to have lost his preferred right of entry by failure to exercise the same within the statutory period, where his action is based on the advice of the local office as to the departmental practice then in force.

On appeal from a decision of the General Land Office all questions involved in the record are brought within the jurisdiction of the Department.

Secretary Bliss to the Commissioner of the General Land Office, November (W. V. D.) 12, 1897. (G. B. G.)

This case is before the Department on the motion of the defendant, Henry W. Seeger, for review of departmental decision of May 25, 1897, in the case of *Thomas J. Lawrence v. Henry W. Seeger*, involving the NW. $\frac{1}{4}$ of Sec. 15, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma (24 L. D., 477).

On October 24, 1892, your office, in accordance with the directions given by the Department in its decision of October 10, 1892, in the case of *Thomas J. Lawrence v. John R. Furlong*, canceled the entry of Furlong for said tract and threw the land open to entry by the first qualified applicant, subject only to the preference right of the contestant, Lawrence.

On November 26, 1892, the local officers served notice upon Lawrence of the cancellation of Furlong's entry.

The record does not show when notice of said departmental decision of October 10, 1892, was served upon Furlong. On January 6, 1893, however, he filed a motion for review of said decision.

On April 8, 1893, the defendant herein, Henry W. Seeger, appeared at the local office, presented a withdrawal by Furlong of the motion for review, and was permitted to make an entry of the tract.

On April 19, 1893, Lawrence filed his homestead application for the land, which was rejected for conflict with Seeger's entry.

On the appeal of Lawrence your office on December 27, 1893, held that his right was superior to that of Seeger and called upon Seeger to show cause why his entry should not be canceled. This decision was not put upon the ground that Lawrence had a valid existing statutory preference right, that right being therein held to have expired, but that being a settler on the land, he had three months time after the record was cleared within which to assert his claim to the tract.

Notice of this decision was served upon counsel for Seeger on January 4, 1894, but no showing being made in support of said entry, on August 17, 1895, said attorneys were served with a second copy of said decision, and on September 27, 1895, Seeger filed appeal to the Department.

By letter of November 20, 1895, your office declined to forward the appeal, for the reason "that the decision of December 27, 1893, ordering him to show cause, is not appealable," and further

that Seeger has failed, after due notice, to make any showing in support of his entry, and the same is hereby held subject to the right of Lawrence to exercise his preference right.

Seeger thereupon filed a second appeal to the Department, and on May 25, 1897, the Department, affirming your office decision, said :

Lawrence contested Furlong's entry, not on the ground of prior settlement, but on the ground that Furlong was disqualified. It is true that he alleged settlement on April 22, 1889, but he did not claim that he had settled prior to Furlong; on the contrary, he testified at the trial that Furlong was on the land when he reached it. The time when he actually settled, then, was immaterial, as he had no rights as against Furlong by virtue of that settlement. On the cancellation of Furlong's entry Lawrence had a contestant's preference right for a period of thirty days, and the principal question for consideration here is as to the date when that preference right began to run.

Before notice was served upon him of departmental decision of October 10, 1892, the practice in regard to closing cases after final judgment by the Department had been changed. When the local officers advised him, then, that he should not attempt to exercise his preference right until after the expiration of the time allowed Furlong for filing motion for review, they were following the new practice—the practice authorized by the decision in the case of *Allen v. Price*. Under that decision it was their duty to reserve the land from entry until after the expiration of the time allowed for filing motion for review, and had Lawrence tendered his homestead application during that time they would have had to reject it.

Furlong filed motion for review on January 6, 1893. The effect of that motion

was to suspend all further action in regard to this land until it had been disposed of. It was withdrawn on April 8, 1893, and at no time prior to that date could Lawrence's preference right as a successful contestant have attached. He filed his homestead application on April 19, 1893, and consequently was in time. It was error on the part of the local officers to allow Seeger to make entry on April 8, 1893.

The motion for review of this decision specifies two grounds of error, viz:

1st. That said decision is predicated solely upon the assumption that the practice in the case of *Lawrence v. Furlong* was governed by the new rule of *Allen v. Price*; while in truth and in fact the practice in that case was not governed by the new rule.

2nd. That it was error to re-open the question of Lawrence's claim to a preference right of entry as successful contestant, in that the same was fully passed upon by the Hon. Commissioner, in his decision of December 27, 1893, and the preference right held to have expired, and no appeal was taken from that holding, and that question was in no wise before your honor for adjudication.

These grounds of alleged error are urged with much elaboration of argument.

It is true that the decision under review is predicated solely upon the assumption that the practice in the case at bar was governed by the rule in the case of *Allen v. Price*. It is also true that the practice in the case at bar should not have been affected by the new rule.

In the case of *Allen v. Price*, *supra* (15 L. D., 424), it was held, that on the successful termination of a contest the land embraced in the canceled entry should be reserved for the benefit of the contestant during the statutory period provided for the exercise of his preferred right of entry. If an application to enter is presented during said period, by a stranger to the record, it should be held in abeyance to await the action of the contestant. This rule was, however, expressly limited by the decision to future cases, and it was said that the case at that time under consideration must be governed by the rule then in force. This decision was made on November 15, 1892.

It results in the case at bar, the judgment of cancellation therein of October 10, 1892, having been carried into effect on October 24, 1892, by the cancellation of the entry of Furlong, the rule in the case of *Allen v. Price* was without application. The application of Seeger, therefore, made on April 8, 1893, he being the first qualified applicant to enter the tract after the cancellation of Furlong's entry, was properly allowed by the local officers under the rule then in force as to that case. But it does not necessarily follow that his entry should stand in the way of the exercise by Lawrence of his preference right of entry resulting from his successful contest of Furlong's entry.

Under the old rule an entry of land made pending the exercise of the preference right of entry of a successful contestant was made subject to the exercise of that right within the time allowed by law. So the question here is, whether Lawrence has lost his preference right by reason of his own laches. I think not. It is true that he was required under the law and regulations of the Department to assert his prefer-

ence right within thirty days from notice of the cancellation of the contested entry. This he did not do, but, as has been seen, the local officers, acting presumably on the assumption that the rule in *Allen v. Price* would govern the procedure in the case at bar, advised him that he should not attempt to exercise his preference right until after the time allowed Furlong for filing motion for review. This advice was erroneous and misleading, was presumably the cause of his not making his application within the time prescribed by the old rule, and being the advice of the officers of the government merely upon a question of departmental practice, should not operate to deprive the applicant of his rights under the law. He filed his application in less than thirty days after the motion for review had been disposed of, which, under the circumstances, is held to be in time.

The second assignment of error is without force. The fact that the contestant did not appeal from the decision of your office of December 27, 1893, holding that his preference right of entry had expired, will not interfere to deny him the benefit of anything in the record, when it is remembered that your said office decision was in his favor, though on another ground, and there was consequently no necessity for him to appeal.

The decision of your office gave him all he asked for, to wit, the right to make entry of the tract.

Moreover, the appeal of Seeger brought the whole record to the Department, and every question in the case was fully within the jurisdiction of the Secretary of the Interior. There was no error in the decision complained of prejudicial to the rights of the complainant, and his motion is denied.

PRACTICE—AFFIDAVIT OF CONTEST—EVIDENCE—OKLAHOMA LANDS.

DEVORE *v.* RIEHL.

The corroboration of an affidavit of contest is for the information and protection of the local officers, and after a hearing is ordered the absence of such corroboration is immaterial.

In a contest based upon alleged priority of settlement it is not essential that the affidavit of contest should set forth that the contestant has established residence on the land, if, at such time, residence on his part is not necessary.

The irregularity of order in which a party may be permitted to introduce his testimony will not be held reversible error where such procedure is not prejudicial to the rights of the adverse party, and is deemed necessary to the ascertainment of the relative rights of both parties.

One who is within the Outlet at the date of the President's proclamation, occupying a tract of leased land by the consent of the Indian agent, but goes outside thereafter, and there remains until after the opening, is not disqualified as a settler, if, by his former presence within the prohibited territory, he secured no advantage over others.

Secretary Bliss to the Commissioner of the General Land Office, November (W.V. D.) 12, 1897. (G. B. G.)

The case of Oliver J. Devore *v.* John A. Riehl has been considered on the appeal of the defendant from your office decision of February

20, 1896, holding his homestead entry, No. 608, for the SE. $\frac{1}{4}$ of Sec. 35, T. 26, R. 1 E., Perry land district, Oklahoma, subject to the plaintiff's superior right.

The entry of Riehl for said land was made on September 23, 1893, and on December 11, 1893, Devore filed his affidavit of contest, alleging that,

on the 20th day of September, 1893, affiant went upon said tract of land with the intention of claiming the same as a homestead, under the homestead law, and made settlement thereon; that on said day I plowed one furrow around the entire claim; that I laid a foundation of 2 by 6's spiked together as a foundation for a house, and hauled stone and placed six piers thereunder; also plowed a tract around said foundation; that on the 25th of September I plowed two acres of said tract; and that said settlement was prior to the entry of Riehl and prior to any settlement made by said entryman or any other person on said tract.

This affidavit was not corroborated.

A hearing was ordered for May 1, 1895, but was continued from time to time until August 13, 1895. In the meantime, however, on July 13, 1895, Riehl filed a motion to dismiss the contest, for the reason that the allegations in the affidavit are not sufficient to constitute a cause of action, and that the same is not corroborated. Devore had personal notice of said motion, and on July 25, 1895, filed an amended affidavit of contest, duly corroborated. The amended affidavit is substantially the same as the first, but alleges, further, that the contestant

followed said improvements up by the establishing of his actual residence on said tract of land on or about 13th day of December, 1893, and has continually resided there ever since, and has made other and valuable improvements on said tract.

When the case was called for trial at the local office, attorneys for the entryman objected to the introduction of evidence under the affidavit of contest, for the reason that the original affidavit of contest, filed December 11, 1893, was a "legal nullity," and for the reason set forth in motion to dismiss, filed July 13, 1894; and for the further reason that the same was not a proper basis of an amendment, and that no proper or sufficient form of a legal affidavit of contest was filed within the three months of the date of alleged settlement.

This objection was overruled, and an exception taken at the time.

The cause proceeded to trial, whereupon the plaintiff offered his testimony in chief touching his alleged settlement on the land in controversy, his improvements thereon, and the date thereof. The defendant then introduced certain testimony in rebuttal, and certain other testimony tending to show that the contestant was disqualified for having been in the Cherokee strip during the prohibited period. The contestant was then permitted to introduce testimony on the question of his alleged disqualification, and also to introduce other and further testimony on the main issue of his alleged prior settlement. This testimony was introduced over the objection of the defendant.

The local officers found that the contestant made settlement on the land prior to the defendant's entry, and that he was not disqualified.

Your office affirmed the finding of the local officers and approved the rulings made by those officers in the progress of the trial.

In the appeal now under consideration it is urged by the entryman, substantially:

1st. That it was error to order a hearing on plaintiff's first affidavit of contest, and error to allow it amended.

2nd. That it was error to allow the contestant to offer evidence in chief after the defendant had met and overcome contestant's evidence on the main issue.

3rd. That it was error to hold that the contestant was not shown to be disqualified.

4th. Error in holding that the contestant's settlement was prior to that of defendant.

The contestant's first affidavit of contest was good. It alleged settlement prior to the entry of the defendant and prior to any settlement made by him or any other person. It did not allege the establishment of residence, but, at the time the affidavit was made, an allegation of residence was not necessary. A settler has a reasonable time after settlement to establish residence, and what is a reasonable time will depend on the circumstances of each case, and any question as to the timely establishment of residence might have been raised at the hearing by the entryman by a plea in the nature of a confession and avoidance. Nor was the affidavit fatally defective for want of verification. The local officers have a large discretion in ordering hearings, and the corroboration of an affidavit of contest is for their information and protection, and the fact that an affidavit of contest is not corroborated is not one that can be taken advantage of by the parties. Moreover, in the case at bar, the amended affidavit was duly corroborated and related back to the original affidavit.

The order in which the contestant was permitted to introduce his testimony was irregular, but the inadequate provisions of law governing trials before the local officers, and more especially the lack of authority in those officers to issue compulsory process to secure the attendance of witnesses, render their attendance capricious and uncertain, so that the ordinary rules of introducing testimony must often be departed from to meet the demands of a more substantial justice. It is not perceived how the substantial rights of the entryman have been injuriously affected by the rulings of the local officers in this regard. The contestant had made a *prima facie* case of settlement on a certain date. This the defendant undertook to break down, and, in a manner succeeded. The contestant was then permitted to introduce other witnesses on the same issue. It will be assumed that the local officers believed this procedure necessary to an ascertainment of the just rights of the parties. Those officers state in their decision herein that they permitted it for the sole "purpose of ascertaining the truth," and further that the contestant did not, on the day he submitted his evidence in chief, have other witnesses on that point, and for this additional reason they were permitted to testify on the following day. There is no reversible error in this procedure.

On the question of alleged disqualification, it appears that the land in controversy is in the Cherokee Outlet which was opened to settlement and entry on the 16th day of September, 1893. It appears further that the contestant was in the Outlet at the time of and after the President's proclamation relative thereto. It appears, however, that he held a lease for certain allotted lands in the Cherokee strip from a Tonkawa Indian, and that he was on this land for the purpose of looking after a crop of hay; that he was there by the written consent of the Indian agent, and that he was not on or in sight of the land in controversy. He went out of the strip as soon as he heard of the President's proclamation, and staid out until twelve o'clock, noon, the day of the opening. He did not settle on the land in controversy until four days after the opening. It is clear that his presence in the prohibited territory secured him no advantage over others.

The clear preponderance of the testimony shows that he made settlement on the tract in controversy on September 20, 1893. The defendant does not claim to have made settlement on the land before the date of his entry, September 23, 1893. Contestant's settlement was prior to the settlement and entry of the defendant, he established residence within a reasonable time, and has since resided on and cultivated the land as required by law.

The decision appealed from is affirmed.

CALIFORNIA SCHOOL LANDS—INDEMNITY SELECTIONS.

INSTRUCTIONS MODIFIED.

Secretary Bliss to the Commissioner of the General Land Office, November 17, 1897. (A. M.)

In your letter of the 10th instant you called attention to the circular of July 23, 1885—4 L. D., 79—wherein the local land officers of the several United States land offices in California were instructed as to the form in which indemnity school selections should be presented, and quoted the last paragraph thereof as follows:

It having been represented that in the State of California the local officers in some of the districts cannot with certainty certify to the validity of the bases used for indemnity school selections on account of the complicated condition of land affairs in the State and imperfection of their records, the registers and receivers therein are directed, upon the filing of applications to make such selections, to certify as to the dates of filing thereof and the condition of their records as to tracts selected and the bases used, and forward the applications to this office by special letters for instructions. They will withhold approval of the applications and refuse to receive the legal fees until advised by this office that the selections may be admitted.

With respect to this paragraph you have stated that the conditions that prevailed when the circular was adopted no longer exist and that its requirements entail additional and unnecessary work on your office, beyond that required in acting on similar selections from other States.

You have accordingly, in view of reasons set forth, recommended that the circular mentioned be modified by striking therefrom the paragraph quoted, and that you be authorized to instruct the local officers in California to accept list of selections and collect fees thereon, on presentation, if their records show the selected lands to be subject to selection and free from adverse claims, and that the bases of the selections are *prima facie* valid.

As by this modification the State of California will be placed on the same footing with other States in the matter of school land indemnity selections, and as it appears that the retention of the paragraph is no longer necessary I hereby modify the aforementioned circular by eliminating therefrom the paragraph under discussion and direct that you instruct the local officers in California in accordance with your recommendation.

CLARK v. MANSFIELD.

Motion for review of departmental decision of April 22, 1897, 24 L. D., 343, denied by Secretary Bliss November 17, 1897.

PRE-EMPTION-INTERVENING CLAIMS-CONTESTANT.

GRANFLADEN v. HAMILTON.

Failure to submit pre-emption final proof, and make payment for the land, within the statutory life of a filing on unoffered land, does not defeat all rights under the filing, but subjects the claim to any legal settlement claim that may intervene. As between a pre-emptor thus in default and a homestead claimant for the same land, who is also in default, in the matter of settlement and residence, the superior right is with the one who first takes steps to cure his default.

A successful contest against the homestead entry in such a case will not defeat the right of a minor claimant under the pre-emption filing to submit final proof, if, prior to the conclusion of said contest application is made to complete the pre-emption claim, and it appears that the contestant had not made settlement on the land at such time, and was aware, at the time of initiating his contest, of the fact that the minor with his guardian was residing upon and claiming the land.

Secretary Bliss to the Commissioner of the General Land Office, November 17, 1897. (W. V. D.) (W. A. E.)

On February 10, 1880, Mary T. Jacobson filed pre-emption declaratory statement for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 23, T. 106 N., R. 50 W., Mitchell, South Dakota, land district, alleging settlement January 25, 1880. Said land being unoffered, the time for making proof and payment under the filing expired October 25, 1882.

On September 8, 1893, T. J. Spangler made homestead entry for the same land.

On April 25, 1895, James Hamilton filed affidavit of contest against Spangler's entry, charging abandonment.

Hearing was had June 4, 1895, the defendant Spangler making default.

June 29, 1895, Thomas L. Granfladen, guardian of Lewis T. Jacobson, minor heir of Mary T. Jacobson, deceased, filed an application to make proof and payment under the decedent's filing. This application was rejected by the local officers on August 2, 1895, for the reason that the land was embraced in the homestead entry of Spangler, and that proof could not be made under said filing after the lapse of the statutory period.

The local officers also, on the same day, recommended the cancellation of Spangler's entry.

Spangler did not appeal, but Granfladen filed appeal from the rejection of his application.

On January 28, 1896, your office canceled Spangler's entry, and further held that Granfladen's application was properly rejected.

February 6, 1896, Hamilton made homestead entry for said tract, and on March 27, 1896, Granfladen filed appeal from your office decision.

It appears from the affidavits submitted with Granfladen's application that Mrs. Jacobson applied to make proof on November 10, 1880, and started to the local land office for that purpose, but was taken sick on the way and died, leaving an infant boy as her sole heir; that a guardian was appointed for the child, and that this guardian offered proof on February 28, 1881, but did not make payment for the land, for the reason that he was unable to procure the necessary amount of money at the time. The guardian then consulted the judge of the county court of the county in which the land is situated, and was informed by him that the land could be held for the heir until he should become of age and make proof for himself, and that it would not be wise for the guardian to make proof or encumber the land in any way.

It is further shown that the guardian and the minor heir have resided on this land ever since the death of Mrs. Jacobson, and that valuable and substantial improvements have been placed thereon.

In the case of *Larson v. Parks*, 1 L. D., 487, it was held that:

Because a party fails only in the matter of time in submitting proof and making payment, he should not be subjected to forfeiture unless a valid adverse interest has attached.

In the case of *Fideler v. Kurth*, 5 L. D., 188, it was held that:

The right of a pre-emption settler, who did not file within the statutory period, is not defeated by the entry of an intervening homesteader who has failed to comply with the law.

To the same effect is the case of *Dunlap v. Raggio et al.*, 5 L. D., 440, wherein it was held that:

In the absence of a legal intervening settlement claim, there is no penalty for failure to make proof and payment for unoffered land within the statutory period. The right of a pre-emptor to purchase is not defeated by the adverse claim of a homesteader who alleges residence within less than six months after entry and fails to show the same.

So also in the case of *Davis v. Davidson*, 8 L. D., 417, in which it was held that:

An intervening adverse claimant, alleging settlement rights acquired after the default of the pre-emptor, must show, in order to defeat the pre-emptor's right of purchase, an actual settlement, based on substantial and visible acts of improvement.

The time for making proof and payment under Mrs. Jacobson's filing expired October 25, 1882, but the failure to make proof and payment within the statutory period did not work a forfeiture of all rights under that filing. It simply subjected the pre-emption claim to any legal settlement claim that might intervene.

It appears that Spangler, the intervening entryman, never settled upon or improved this land. He seems to have abandoned all claim to it as soon as he learned that the guardian and minor heir were residing there. As soon as he defaulted in the matter of settlement and residence, he and the pre-emption claimant stood on an equal footing, and thereafter the better right would rest with him who first took steps to cure his default. Granfladen, by filing his application to make final proof, took the first step, and thus acquired the superior right.

At the time, then, that Hamilton filed his affidavit of contest against Spangler's entry, said entry was not the superior claim to the land, but merely stood on an equal footing with the pre-emption claim. Before the contest was decided, the pre-emption claim had become the superior claim. Could Hamilton, by successfully contesting the inferior claim, that is, the homestead entry, also defeat the superior claim, which in this instance was the pre-emption claim? It seems to be a logical ruling that the simple removal of the inferior claim did not in any way affect the superior claim, and that it was necessary for Hamilton to do something more than secure the cancellation of Spangler's entry in order to defeat the rights of the pre-emption claimant. He might have defeated the pre-emption claim by making settlement on the land prior to the time Granfladen filed his application to make final proof, but he did not do this. His settlement and entry are subsequent in date to Granfladen's application.

Again, it appears that at the time Hamilton initiated his contest he had full knowledge of the fact that the guardian and the minor heir were residing upon and claiming this land. He testified at the trial that prior to initiating contest he went out to the land and examined it; that he found Granfladen living there; that he tried to get the job of painting the dwelling house; that Granfladen told him that on account of bad crops he could not afford at that time to have the painting done; and that he thereupon offered to take Granfladen's note and wait on him till fall.

In the case of *Blake v. Marsh*, 10 L. D., 612, it appeared that John Blake filed pre-emption declaratory statement for a certain tract on July 1, 1870, and died before making final proof. His widow continued

to reside upon and improve the land, but did not offer to make final proof until April 2, 1880, when she discovered that on the preceding day Henry J. Marsh had made homestead entry covering a portion of the land embraced in the pre-emption filing of her deceased husband. It was said in that case:

In the case at bar the evidence shows that Marsh knew that Mrs. Blake claimed said tract, that she had resided thereon continuously since her husband's death, and he had fully recognized her superior right by asking permission, from both her husband and Mrs. Blake, to cultivate a portion of the land. . . . The fact that Marsh, after living on his homestead claim, as he alleges, for six years without any claim of record, succeeded in placing his entry of record one day prior to the date when Mrs. Blake appeared at the local office to perfect the claim filed by her husband, will not defeat the superior equity of Mrs. Blake for the tract upon which she had her home, and which Marsh knew she claimed and had reason to believe she was about to enter.

The Department will exercise its supervisory authority to see that the home of the widow and the orphans shall not be taken away by one who, "by a seeming compliance with the forms of law," seeks to obtain title thereto under the homestead law.

See also *Caldwell v. Carden*, 4 L. D., 306; *Turner v. Bumgardner*, 5 L. D., 377; *Tustin v. Adams*, 22 L. D., 266; *Rector v. Gibbon*, 111 U. S., 276.

Whether, then, the case, as now presented to the Department, be considered from the strict legal standpoint or from the standpoint of equity and justice, the conclusion is the same, viz., that the guardian should be allowed to make proof and payment under Mrs. Jacobson's pre-emption filing for the benefit of the minor heir.

By your office letter of September 22, 1897, were transmitted the record in the contest of one Fred Dede against the homestead entry of Hamilton, and the protest of Granfladen against said contest on the ground that it is collusive and fraudulent.

As Dede's affidavit of contest, filed July 25, 1896, is subsequent to Granfladen's application to make proof and payment under Mrs. Jacobson's filing, any rights that Dede may have in the premises are subject to those of Granfladen.

Your office decision of January 28, 1896, is reversed so far as it rejects Granfladen's application to make proof and payment. Dede's contest will be suspended pending the submission of proof by the guardian. If the proof submitted by the guardian is found to be satisfactory, you will call upon Hamilton to show cause why his entry should not be canceled.

HUDSON v. ORR.

Motion for review of departmental decision of May 11, 1897, 24 L. D., 429, denied by Secretary Bliss November 17, 1897.

DESERT LAND ENTRY—ORDER OF SUSPENSION.

BASHORE *v.* LATHAM.

On the revocation of an order suspending a desert land entry time does not begin to run against the entryman until he is properly served with a definite notice of such revocation.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 17, 1897. (E. M. R.)

This case involves the NE. $\frac{1}{4}$ of Sec. 22, T. 27 S., R. 24 E., M. D. M., Visalia land district, California.

It appears from the record that on the 30th day of April, 1877, J. K. S. Latham made desert land entry for the above described land, which entry, together with others, was suspended on September 28th, 1877, under order of September 12, 1877. February 10, 1891, said general order of suspension was revoked under departmental directions made on January 12, 1891.

On the 17th day of May, 1895, John Bashore filed an affidavit of contest, alleging failure to comply with the terms of the desert land act in the matter of reclamation of the land.

The local officers ordered a hearing to be had on August 5, 1895, at which time the plaintiff appeared and made affidavit, as provided, and applied for order of service of notice by publication. This order was accordingly granted by the local officers and September 13, 1895, set as the date of hearing. When said time arrived for the trial of the cause, counsel for the defendant moved that the contest be dismissed for the reason that no cause of action was stated in the affidavit of contest, inasmuch as the allegation of non-reclamation was premature. This motion was overruled and the contestant introduced testimony, to which action the defendant excepted alleging that the appeal from the ruling of the local officers, filed by him, had ousted them of jurisdiction.

On the 16th day of September, 1895, the local officers rendered their decision finding that three years had elapsed—the time allowed by the original desert land act—since the date of said entry, exclusive of the period of suspension, and that the land had not been reclaimed; they, therefore, recommended the cancellation of the entry.

On appeal, your office decision of April 23, 1896, reversed the action of the local officers, holding that three years, exclusive of the period of suspension, counting from the time proper service of such revocation of suspension was made on the defendant, to wit, the 22nd day of August, 1893, had not expired.

Appeal by the plaintiff brings the cause before the Department.

In the case of Farnell *et al. v.* Brown (21 L. D., 394), it was held that time did not commence to run against a desert entryman, after the order of revocation of the suspension, until due and proper notice of such revocation was given him. That case arose in the same land

office and had reference to the entries which were suspended and the revocation of the suspension ordered February 10, 1891, by the Department. It was held in the opinion:

It is shown that from May 9, to June 1, 1891, the local officers, by ordinary mail, notified the desert entryman of the decision of February 10, 1891, and on August 15, 1893, your office instructed the local officers that this notice was insufficient, inasmuch as the Rules of Practice required notice to be sent by registered mail.

To the same effect is the case of *White v. Dodge* (21 L. D., 494).

Counsel for the appellant argues that the defendant was represented before the Department by attorneys in the proceedings leading to the decision of January 12, 1891, revoking the suspension of these entries, and that they were notified thereof on February 10, 1891, and that such notice was, in law, notice to this entryman; further, that your office erred in not considering the notice given to said attorneys on said date, February 10, 1891, and also the notice given them on the following dates: August 5, 1892, November 7, 1892, December 2, 1892, and January 6, 1893, and that, therefore, the notice given on August 22, 1893, to the entryman was wholly unnecessary.

This question was considered in *White v. Dodge*, on re-review (23 L. D., 240), and as now presented is in all essential respects similar to the case as then presented, except that in said case the notice given said attorneys on February 10, 1891, and on September 25, 1891, was set out in full, whereas in the cause at bar such alleged notices are not set out and are referred to by date only.

In the case of *White v. Dodge*, on re-review, *supra*, it was held that the notice contained in the letter of February 10, 1891, and that contained in the letter of September 25, 1891, to the attorneys representing one hundred and sixty-three desert entrymen, in Kern county, California, were not sufficient in themselves, and it was determined as matter of law that the maxim *id certum est quod certum reddi potest* did not apply to matters of pleading, and that the notice shown was too vague and indefinite.

This entry having been made on the 30th day of April, 1877, having been suspended on the 28th day of September, 1877, the order of suspension having been revoked and proper notice thereof having only been given on August 22, 1893, and the contest affidavit having been filed May 17, 1895, it follows that this entry has only been in existence, excluding the period of suspension, two years, one month and twenty-four days, counting to the time of the filing of the affidavit of contest.

In this case, however, it appears from what has heretofore been set out, that at the original date set for hearing, to wit, August 5, 1895, this plaintiff set forth that he had not made service and asked for order of service by publication, which order, as has been seen, was accordingly granted and hearing set for September 13, 1895. Without ascertaining when said service by publication became complete it is sufficient to say that it became so prior to such latter date, making a total of two years,

six months and twenty-one days that the entry had been in existence, exclusive of the period of suspension, as determined up to the time when proper notice of its revocation was given the entryman.

Your office was correct in dismissing the contest and that action is affirmed.

WAGON ROAD GRANT—BONA FIDE PURCHASER—CONFIRMATION.

CALIFORNIA AND OREGON LAND COMPANY.

The title of a purchaser in good faith from a wagon road company of lands previously certified thereto, is confirmed, in the absence of adverse claims, although by the true construction of the grant to said company said lands were excepted therefrom; and in such case the only remedy left to the government is by way of suit against the wagon road company to recover the value of said lands.

Secretary Bliss to the Commissioner of the General Land Office, November 19, 1897. (W. V. D.) (F. W. C.)

With your office letter of October 2, 1897, was enclosed a copy of your office decision of April 2, 1897, in which it was held that the $S\frac{1}{2}$ of the $NE\frac{1}{4}$ and $E\frac{1}{2}$ of the $SE\frac{1}{4}$ and lots 5 and 6 of Sec. 31, T. 18 S., R. 1 W., Roseburg land district, Oregon, were excepted from the grant made July 2, 1864, (13 Stat., 355) to aid in the construction of the Oregon Central Military Road, and in which a rule was laid upon said company and its successors, the California and Oregon Land Company, to show cause why proceedings should not be instituted to set aside the title erroneously conveyed by the certification made on December 8, 1871, on account of said grant.

The records show that the tract above described was embraced in the donation certification of Oliver L. Barrett, filed April 4, 1855, which claim remained of record until canceled by your office April 4, 1896.

To said rule the California and Oregon Land Company responded, asking the dismissal of the rule, upon the ground that the donation notification was not sufficient to except the tract from the grant named; and, further, that said company, the California and Oregon Land Company, had been adjudged to be a *bona fide* purchaser from the Oregon Central Military Road Company of the land in question, in the case of the United States *v.* The California and Oregon Land Co. (148 U. S., 31), and that its title was therefore confirmed by the act of March 2, 1896 (29 Stat., 42).

Your office letter of May 22, 1897, refused to dismiss the rule, and as no further answer was made thereto the matter is submitted for the consideration of this Department.

In the case of the United States *v.* Winona and St. Peter Railroad Co., (165 U. S., 463) the court, after referring to the acts of March 3, 1887, (24 Stat., 556) and March 2, 1896, (29 Stat., 42) states that:

Our conclusion is that these acts operated to confirm the title to every purchaser from a railroad company of the lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land depart-

ment, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, provided that he purchased in good faith, paid value for the lands, and, providing, also, that the lands were public lands in the statutory sense of the term and free from individual or other claims.

Barrett's claim under the donation notification, which is held to have been sufficient to have defeated the grant, having been duly canceled and the California and Oregon Land Company having been adjudged to be a *bona fide* purchaser from the Oregon Central Military Road Company, it follows, under the decision above quoted, that as to the land here involved the title of the California and Oregon Land Company must be held to have been confirmed, and no action should be brought by the United States looking to the setting aside of the title conveyed under the certification before referred to. The only right remaining to the United States is the right to recover the value of the land from the Oregon Central Military Road Company. To this end, I have to direct that demand be made upon said company, if still in existence, or upon any one found who can be held liable through that company.

DITTMER *v.* WOLFE.

Motion for review of departmental decision of August 19, 1897, 25 L. D., 137, denied by Secretary Bliss, November 19, 1897.

PRIVATE LAND CLAIM—SMALL HOLDING.

DONACIANO CHAVEZ.

Under section 12, act of March 3, 1891, all claims under Spanish or Mexican grants, referred to in section 6 of said act, are to be held as abandoned, if not presented before the court of private land claims within two years from the taking effect of said act; and a grant occupying such status is consequently no bar to the adjudication of a "small holding" lying within the limits of such grant.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 19, 1897. (C. W. P.)

With your letter of August 11, 1896, you transmit the appeal of Donaciano Chavez from the decision of your office of April 15, 1896, suspending his "small holding" claim, No. 1759, for 3.77 acres of land in section 32, township 10 N., range 3 E., Santa Fe land district, New Mexico, until the question of title to the "Antonio Sandoval" grant is determined.

March 2, 1896, Chavez submitted proof of his possession and occupation of said land, which was rejected by the local officers for conflict with the timber culture entry, No. 141, of Richard Page. Chavez appealed. Your office found that Chavez claims title from Francisco Savedra, through Antonio Sandoval and others, and that an examina-

tion of memoranda on file in your office shows that the land claimed by Mr. Chavez is within the limits of the "Antonio Sandoval," or "Las Lagunitas" grant, and that this grant has not been surveyed, but that its *locus* south of the Albuquerque grant, as shown, as well as its probable location furnished by the surveyor-general of New Mexico, indicates that Sec. 32, T. 10 N., R. 3 E., is entirely within the limits of said grant; and the claim of Chavez was held suspended until the question of title to the "Antonio Sandoval" grant is determined. From this decision Chavez has appealed, and in his appeal alleges:

(1) That there is no such a recognized grant as the 'Antonio Sandoval' or 'Las Lagunitas grant.'

(2) That if any such a grant ever existed, the same has never been officially recognized, but has been rejected by the surveyor general of the Territory of New Mexico.

(3) That the Department has ruled against the existence of any such grant, and has issued patents, for lands embraced within the said alleged grant.

By the act of March 3, 1891 (26 Stat., 854), Congress established the court of private land claims, for the final adjudication of all private land claims in the Territories of New Mexico, Arizona, Utah and the States of Nevada, Colorado and Wyoming.

The object of said act was the final adjudication of all private land claims in the States and Territories mentioned in the act, and the creation of a special tribunal was to provide for the adjudication of claims under grants made by Spain or Mexico, to land within the territory specified in said act, prior to its acquisition by the United States. Congress invested said tribunal with full authority to determine every question, subject to the right of appeal to the supreme court of the United States, respecting the validity, extent and scope of all unadjusted claims to lands included in Spanish or Mexican grants. The title, validity and boundaries of such grants or claims were to be adjudicated according to the law of nations, the stipulations of the treaty concluded between the United States and the Republic of Mexico at the city of Guadalupe-Hidalgo, on February 2, 1848, and the treaty between the same powers on December 30, 1853, and the lands embraced within the boundaries of Mexican or Spanish grants or claims at the date said treaties were ratified were placed in a state of reservation, which has been continued in force by the act of March 3, 1891, *supra*, and will so remain until after the judgment of said court becomes final and in all respects complete.

But in view of the statements contained in Mr. Chavez's appeal, and of section twelve of the act of March 3, 1891, *supra*, which provides that all claims mentioned in section six of said act (which provides for the adjudication of claims under grants by Spain or Mexico), shall at the end of two years from the taking effect of the act, if no petition in respect to the same shall have then been filed, be deemed and taken, in all courts and elsewhere, to be abandoned, and shall be forever barred, you are directed to ascertain whether any claim has been filed in the court of private land claims under the "Antonio Sandoval" or "Las Laguni-

tas" grant, and this case is returned to your office that you may pursue this course, and in case it appears that there has been no claim filed in the court of private land claims under the "Antonio Sandoval" or "Las Lagunitas" grant, you will consider the proof submitted by said Chavez on his "small holding."

The tract book of your office shows that August 11, 1896, the day of the date of your letter of transmittal, the timber culture entry, No. 141, of said Page was canceled by your office, from which action Page has not appealed.

The decision of your office is modified accordingly.

STATE OF WASHINGTON *v.* MCBRIDE.

Motion for review of departmental decision of August 27, 1897, 25 L. D., 167, denied by Secretary Bliss, November 19, 1897.

RAILROAD GRANT—INDEMNITY SELECTIONS.

UNION OIL COMPANY.

Action suspended on that part of the departmental decision of November 5, 1897, herein, which relates to the question of the right of the Southern Pacific R. R. Co. to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant.

Acting Secretary Davis to the Commissioner of the General Land Office,
(W. V. D.) November 22, 1897. (A. B. P.)

The Southern Pacific Railroad Company, by its attorneys, has filed in this Department an application for a suspension or modification of that part of departmental decision of November 6, 1897, in the case of the Union Oil Company, on review, 25 L. D., 351, which holds that:

The question as to the right of the Southern Pacific Company to make indemnity selections within the forfeited primary limits of the grant to the Atlantic and Pacific has been finally determined adversely to the Southern Pacific by the supreme court (168 U. S.,) and a discussion of any claimed rights under the railroad's selection of the land here in question is, therefore, unnecessary.

In the application it is set forth that counsel for the railroad company have applied to the supreme court for an order staying the issue of the mandate on the court's decision in the case referred to, with the view of obtaining a rehearing or reconsideration thereof, and that an order has been made accordingly, staying the mandate for thirty days.

The application is duly supported by affidavit, and in view of the matters presented it has been determined to treat the same as a petition for re-review of said departmental decision as to the single matter complained of; and for the purpose of having the said matter further considered if deemed necessary, after final action by the supreme court

upon the said motion, you are hereby directed to suspend action upon that part of said departmental decision relating to the question of the right of the Southern Pacific Railroad Company to make indemnity selections within the forfeited primary limits of the Atlantic and Pacific grant until further ordered.

SETTLEMENT—APPLICATION—REHEARING—ACT OF SEPTEMBER 29, 1890.

KENNY ET AL., *v.* JOHNSON ET AL.

The extent of a settlement claim, as defined by acts of occupancy and improvement, is limited to the technical quarter section on which such acts are performed.

No rights are acquired under an application to enter lands that are at such time embraced within an existing order of withdrawal, made in aid of a railroad grant.

A rehearing will not be ordered on a cause of action arising after the close of the hearing before the local office, and pending appeal from its decision.

The right of persons alleging settlement on lands opened to such appropriation under the act of September 29, 1890, is not affected by the fact that such lands were at the time of settlement and application therefor, reserved from disposal under the departmental rulings then in force.

Secretary Bliss to the Commissioner of the General Land Office, November 23, 1897. (W. V. D.) (C. J. W.)

The following applications were received at the Ashland land office, Wisconsin, by mail, at and before nine o'clock A. M., on November 2, 1891:

John J. Kenny for the NE. $\frac{1}{4}$, Sec. 17, T. 48 N., R. 8 W., alleging settlement October 24, 1891.

Helen Delaney for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, same township and section, alleging settlement October 24, 1891.

Edgar A. Glossup for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, alleging settlement October 24, 1891.

Simon Amunson for the NE. $\frac{1}{4}$, alleging settlement September 19, 1891.

Richard Long for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, alleging settlement March 10, 1890.

At 9:41 o'clock a. m., on November 2, 1891, William B. Philbrick, by agent, filed soldier's declaratory statement for the NE. $\frac{1}{4}$, same township and section.

At 9:45 a. m., same day, Nick D. Luce made homestead application for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$.

At 9:56 a. m., same day, John T. Hanley applied to enter the NE. $\frac{1}{4}$.

At 11:50 a. m., same day, Harvey Ellerman applied to make homestead entry for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, alleging settlement October 24, 1891.

On November 10, 1891, Jack Johnson applied to enter the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, alleging settlement October 8, 1891.

The local officers rejected the applications of Hanley, Luce and Philbrick, because of conflict with prior applications, the latter applicants not having alleged settlement.

Your office reports that Glossup has relinquished his claim and is out of the case, which is closed as to him.

The local officers ordered a hearing as between the parties alleging settlement. Kenny, Long, Amunson and Johnson appeared in person and by counsel and submitted evidence in support of their respective claims. The hearing began February 25, 1892, and lasted several days. The record consists in part of nearly a thousand pages of testimony. After the hearing closed the local officers recommended the allowance of the application of Jack Johnson for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, that of Glossup for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and that of Kenny for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$. The losing parties appealed to your office. Luce and Philbrick also appealed from the rejection of their applications, and at the same time filed an application for hearing, at which they might have an opportunity to offer testimony in support of their claims.

By letter ("H") of January 21, 1893, your office considered the appeals of the parties, complaining of the action of the local officers awarding the right of entry to Johnson, Kenny and Glossup, and the appeals of Luce and Philbrick, together. The question was also considered as to whether or not Luce and Philbrick had shown any proper ground for a further hearing. The action of the local officers in rejecting the applications of Luce and Philbrick was approved, and it was further held that no right was acquired by reason of any settlement made prior to midnight, November 1-2, 1891, and as none of the parties to the hearing had shown settlement subsequent to that time and prior to nine a. m., November 2, 1891, at which hour the conflicting applications of Kenny, Glossup, Amunson and Long were received, that the right of entry would be awarded to the highest bidder as between said parties.

On March 6, 1893, Luce and Philbrick filed motion for review of your said office decision, and Amunson, Long, Kenny and Ellerman appealed from it. The motion for review, without being acted upon by your office, was forwarded to the Department, with the record and appeals aforesaid. On July 2, 1894, the record was returned to your office for appropriate action on the motion for review, and by letter ("H") of July 23, 1894, your office granted the motion and awarded the right of entry to Luce and Philbrick, the applications of Long, Kenny and Amunson being fatally defective under the rule announced in the case of *Smith v. Malone* (18 L. D., 482), they, with the affidavits upon which they were based, having been executed prior to November 2, 1891.

On March 7, 1896, the Department, on appeal, affirmed this decision, but on October 16, 1896, on motion for review, the Department revoked and recalled its decision of March 7, 1896.

Up to that time, and prior to the decision of the supreme court in the case of *Wisconsin Central Railroad Company v. Forsythe* (159 U. S.,

46), the indemnity withdrawal under the act of 1856 for the Omaha Company was held to be sufficient to defeat the grant made by the act of 1864 for the Wisconsin Railroad Company, and the lands in question were treated as in reservation. So long as the lands were treated as in reservation, it followed that rights under settlements alleged to have been made while the lands were thus reserved were disregarded and deemed of no effect.

The decision of the supreme court, before referred to, reversed the former holding of the Department in reference to this matter, and it became necessary that the Department should thereafter make its decisions accord with said decision of the supreme court. In order that this might be done, and that your office might have opportunity to consider the case in the light of the changed ruling, the previous action taken in the matter was set aside and the case remanded for your further consideration. Your attention was called to the fact that the previous action in reference to the rights of the several applicants had been taken upon a mistaken conclusion as to the actual status of the lands.

For your guidance in disposing of the lands under the act of September 29, 1890 (26 Stat., 486), and the act of May 14, 1880, said decision stated that:

The restoration of the lands within the fifteen mile limits of the Omaha grant did not become effective until November 2, 1891, and although the restoration then ordered erroneously considered the lands as surplus Omaha lands, yet as such action was in accordance with the ruling existing at the time, under which no application could have been accepted, in the determination of rights, both under the act of 1890 and the law of May 14, 1880, the time should not be considered as beginning to run until November 2, 1891.

The rule was thus indicated that in determining whether or not an application was filed in time under these acts, it would be computed from November 2, 1891.

On February 12, 1897, your office further considered and re adjudicated the rights of the parties under said acts of September 29, 1890, and May 14, 1880. In addition to the questions previously considered by your office, the affidavit of John J. Kenny, alleging that Long, Amunson and Ellerman had abandoned the land applied for by them, and that he (Kenny) had continued his residence, and the affidavit of Jack Johnson, alleging that Harvey Ellerman had abandoned the land embraced in his application, and that he (Johnson) had continued his residence, filed May 29, 1894, are referred to, but not passed upon, because they raise an issue not involved in the original hearing.

November 30, 1896, Harvey Ellerman filed application for further hearing, alleging that on the 20th of October, 1888, he settled on the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and began building a house, when an order was issued by the Secretary and Commissioner to the effect that parties going on said lands were trespassers, and that he temporarily left said land, and that as soon as the said lands were opened to entry, he stood in line

and offered his filing for said land, and that Kenny and Johnson knew when they settled on the land that he had made settlement on it. This new matter your office disposed of in said decision of February 12, 1897, by denying the application.

In re-adjudicating the rights of the parties under the original record, your office finds that Long, as the prior settler, is entitled to enter the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and you reject his application for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and find that Amunson is entitled to enter the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, not applied for by Long; that Jack Johnson was the first settler on the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and entitled to enter it. From this decision Kenny, Long, Philbrick, and Luce have appealed—Kenny and Long separately, and Philbrick and Luce jointly.

Long presents two propositions in his appeal which seem to require specific consideration, and they substantially embrace the material errors which he alleges were committed. One of them is, that it was error not to find that he had made sufficient settlement on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ to extend his claim so as to embrace the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ by reason of the notice of his claim and settlement. Second: error in not holding that he (Long) was entitled to the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ by virtue of his homestead applications of March and April, 1891, under the decision of the supreme court in the case of *Ard v. Brandon* (156 U. S., 541).

The record shows that Long went on the claim on March 10, 1890, and cleared a small space, but remained only a few hours. He went back to it June 25, 1890, and had the lines surveyed, and remained until July 1, 1890. He went upon it again September 25, 1890, and remained until December 20, 1890, during which time he built a log house on the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and cleared about a fourth of an acre; brought his wife to the place October 31, 1891, two days before the land was declared open to settlement and entry. His occupancy was desultory, and his improvements meager and confined to the NE. $\frac{1}{4}$. The facts present no such equitable claim as was presented by Ard in the case cited. There is not sufficient evidence of notice of a claim to the SE. $\frac{1}{4}$ to extend Long's settlement rights to that quarter, and make the rule in *Sweet v. Doyle et al.* (17 L. D., 197,) applicable to his case. It remains to inquire whether or not his application to enter it, made while the Department was holding the land in reservation by virtue of its withdrawal for the benefit of the Omaha Company, and rejected for that reason, conferred any right on Long. In the Ard case there had been no order of withdrawal, either erroneous or authorized, and the inference is very strong, from what is said in stating the facts in that case, that if there had been a formal order of withdrawal, the ruling would have been different.

On May 29, 1856, all odd numbered sections within the fifteen mile limit were withdrawn, and on February 5, 1866, all odd numbered sections within the twenty mile limit were withdrawn for the benefit of the

Chicago, St. Paul, Minneapolis, and Omaha Railroad Company. *Shire et al. v. said Railroad Company* (10 L. D., 85).

Under these orders the lands were held as reserved from entry until November 2, 1891.

These orders are decisions of the Department, and have the force and effect of decisions, and were sufficient to authorize and support the rejection of applications to make entry of lands covered by them, while they remained unrevoked. If an erroneous and invalid entry will reserve land from other entry until it is removed, certainly a departmental order of withdrawal, duly made and entered of record, will be of equal force. *United States v. Puget Mill Company* (13 L. D., 386).

Long acquired no rights by virtue of his application to enter while said orders of withdrawal were operative, and he has only such rights as he acquired by virtue of his settlement and improvements, and your office properly limited his right of entry to the NE. $\frac{1}{4}$, on which his house and improvements are located. His appeal need not be further considered.

The appeal of John J. Kenny is directed against the finding in favor of Long for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and of Amunson for the remainder. He appends to his appeal a petition, calling attention to affidavits filed May 29, 1894, in which it is alleged that Long and Amunson have abandoned their settlements, and asking for a further hearing. This is an effort to obtain a hearing on a new cause of action, arising after the close of the hearing before the local office and pending appeal from its decision. It was properly held by your office that this ground could not be considered in connection with this case. Kenny shows no superior right to either Long or Amunson to any part of the NE. $\frac{1}{4}$, and your office committed no error in awarding said NE. $\frac{1}{4}$ to them.

The record supports the finding of facts made by your office as to the character of settlement made by the several parties and as to the time when made. Long and Amunson were both prior to Kenny in making settlement, and Kenny's first alleged settlement, on October 24, 1891, was too slight to amount to anything at best. His own witness Connor, page 87 of the record, testified that on that day he cut the brush from a space large enough to lie down on, to locate himself on. Even this was after the settlement of both Long and Amunson on different ends of the NE. $\frac{1}{4}$.

The joint appeal of Philbrick and Luce presents two questions, which demand some notice. The first is, that it was error not to treat the applications of Kenny, Long and Amunson, dated October 31, 1891, as nullities, as the lands were not declared open to entry until November 2, 1891. In reference to this, it may be said that the applications were not rejected, but received, and that each alleged settlement on the land applied for at a date prior to the applications of Philbrick and Luce, and a hearing was ordered. It has already been determined in the remanding of these cases for re-adjudication by your office that the doc-

trine laid down in the case of *Smith v. Malone* (18 L. D., 482,) does not apply to these lands, so as to affect the rights of parties settling upon them prior to November 2, 1891. This objection must, therefore, fail. The next proposition is, that it was error upon the part of your office to deny their application for a hearing. By their application, as held by your office, they alleged and sought to establish no fact by proof which did not appear from the record. They sought to predicate no right based on any act performed before the first day of November, 1891, and showed no proper ground for a hearing. The application was therefore properly denied, and this ground of appeal must fail.

It is further objected that the applications of Long, Kenny and Amunson were executed at Iron River, some thirty miles from the land office, and forwarded by mail. No sufficient reason appearing for holding these applications defective, this objection is deemed insufficient.

Your office decision is accordingly affirmed.

HARDING v. MOSS.

Motion for rehearing in the above entitled case denied by Secretary Bliss, November 23, 1897. See departmental decisions of February 13, 1897, 24 L. D., 160, and May 13, 1897, 24 L. D., 434.

HOMESTEAD CONTEST—SALE OF POSSESSORY RIGHT.

RYAN v. BAKER.

The Department has no jurisdiction to vacate a contract providing for the sale of a possessory right to a tract of land entered into by adverse claimants therefor, or enforce specific performance thereof, but it may consider and interpret said contract for the purpose of determining the qualifications and good faith of the parties thereto, as applicants under the homestead law.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 23, 1897. (C. J. W.)

On September 21, 1893, Troy B. Baker made homestead entry No. 462 for the SE. $\frac{1}{4}$ of Sec. 21, T. 23 N., R. 1 W., at Perry, Oklahoma.

On September 28, 1893, William M. Bruce initiated contest against the entry, alleging prior settlement.

On October 6, 1893, William H. Ryan filed affidavit of contest, in which he alleged settlement prior to the entry and prior to any settlement by Baker or Bruce.

On November 25, 1893, these cases were consolidated and set for hearing on January 25, 1894. The case was continued from time to time until August 22, 1894, when all parties being present the contest of Bruce was dismissed on his own motion, and no further action was then taken.

On August 27, 1894, Ryan moved to have his case again set for hearing, and after a number of orders and continuances, a hearing was commenced on April 16, 1895, and concluded on May 23, 1895.

On May 24, 1895, the local officers rendered a decision, recommending that plaintiff be required to pay defendant the sum of \$300.00, which he had received from her on a certain contract of compromise in reference to the land, and upon proof of such repayment to her, her entry be held for cancellation.

Both parties appealed, and on February 24, 1896, your office reversed the decision of the local officers and dismissed the contest. From this decision Ryan has appealed, and his first and chief exception is, that it was error not to find that he was the first settler on the land, and by reason thereof entitled to it. In reference to the settlement of the parties, respectively, your office found as follows:

It appears from the evidence that both parties made the race into the "Outlet" from the southern boundary thereof on September 16, 1893; that the plaintiff reached and staked this land about 1:25 P. M., of that day, and the defendant, according to her own testimony, at about 1:30.

It further appears that the defendant has resided on said land continuously ever since about October 26, 1893, when she built a plank house thereon, twelve by fourteen feet, and furnished the same; that at the time of the hearing she had in addition thereto, a dugout, a well, thirty-five acres of breaking, some fencing, and other improvements.

The plaintiff has never established residence on said land, nor made any improvements thereon since the fall of 1893.

The reasonable interpretation of the language used is that your office found that plaintiff was the first to reach the land and perform initial acts of settlement thereon, but that the initial acts had not been followed up by permanent improvements and the establishment of residence, and, therefore, did not constitute a ground which would authorize the cancellation of defendant's entry.

The plaintiff on the hearing sought to explain and excuse his failure to make improvements and reside upon the land because of force and intimidation used by defendant and her brother to prevent his occupancy of it. The local officers expressed the opinion that he should be excused from the legal requirement to improve and live upon the land under the showing made. Your office recapitulates the facts which plaintiff relied upon to excuse his apparent laches in failing to improve and reside upon the land, but no specific decision is made as to whether they amount to a legal excuse for such failure or not. Leaving that question unadjudicated you refer to other facts occurring before the hearing, and which are a part of the record, and make them the chief basis for your decision. These facts relate to a contract or agreement entered into between the parties to settle all controversy about the land upon certain terms therein mentioned. This contract is in writing, and was introduced by defendant on the trial. The defendant, Ryan, and Bruce are all parties to it, and signed it. Under its terms, Bruce agreed

to relinquish his claim in favor of defendant, in consideration of ninety dollars to be paid by her, fifty dollars down and her note for the remainder, and Ryan agreed to dismiss his contest for the consideration of three hundred dollars and the costs of a certain action of forcible entry and detainer, which had been decided in favor of defendant in the district court of "P" county, except \$10 of said cost and the witness fees of Ryan's witnesses, which were to be paid by him.

It appears that in pursuance of the contract, Bruce dismissed his contest; that on August 22, 1894, the day on which the contract was entered into, the defendant placed the three hundred dollars to be paid Ryan in the hands of one Collins, to be held until she could pay her part of the court costs aforesaid, amounting to about thirty-five dollars. It appears that before defendant obtained the money to pay said costs, an execution issued and Ryan paid it; that soon thereafter the defendant, by her attorney, tendered him a check or draft for thirty-five dollars, which was then insufficient to pay the whole amount, and was declined. It further appears that on the day Collins received the three hundred dollars, he placed it in the hands of Ryan's wife, who afterwards delivered it to Ryan, who retained it and has neither returned nor tendered it back to Miss Baker, but has used a part of it in prosecuting the contest against her entry. Ryan's contention is, that as she failed to comply fully and specifically with the terms of the contract, he is not bound by it, and was at liberty to proceed with his contest as he has done, as though no such contract had been entered into; and, further, that the Department is without jurisdiction to enforce the contract or to rescind it.

It is insisted by counsel for plaintiff that your office interpreted the contract with a view to its equitable enforcement between the parties, and that it was erroneously interpreted.

Your office decision is not so understood here, but, on the contrary, it does not undertake either to rescind the contract or to compel the specific performance of it, but leaves these matters to the courts, where they properly belong. It does not follow, because the Department is without jurisdiction to rescind such contract, or compel the specific performance of it, or award damages for breach thereof, that it may not look to, construe and interpret it for the purpose of ascertaining how it affects the qualifications and good faith of the parties as homestead applicants and claimants.

The evidence in this case clearly discloses the fact that the plaintiff, who was claiming the right to the possession of the land in dispute with a view to acquiring title to it under the homestead laws, had not only agreed to sell such right, but had in his possession at the date of the hearing a large part of the price agreed upon. More than six months elapsed between the date of the contract and the receiving of the three hundred dollars, August 24, 1894, and the date of the hearing, April 16, 1895. It was admitted, and shown by the evidence, that plaintiff had

never established residence upon the land, and that he was and had been for a considerable time a resident of Perry. This, in law, was sufficient to render of no effect any right acquired by him on the day of opening by initial acts of settlement. But the plaintiff insisted at the hearing and is still insisting that his absence from the land was not voluntary, but forcible, and that his absence should be excused. Your office did not undertake to decide whether his absence from the land, under the facts disclosed, was excusable up to the time of the date of this contract or not, and it is not necessary that it should be determined now; because it is apparent that from the date of his contract to sell his possession, his absence from the land was voluntary, and is equivalent to an abandonment of it.

On the 30th of April, 1896, after the close of the hearing on the original contest, and while it was still pending on appeal, Ryan filed another affidavit of contest against the same party for the same land, which is denominated a supplemental affidavit. On May 9, 1896, Troy B. Powell, *nee* Baker, filed motion to dismiss the same. On May 21, 1896, the motion was granted, and the second contest dismissed by the register and receiver. From this order Ryan appealed to your office, and the papers in the case are here, without any action upon them by your office. They are returned for appropriate action. This is the affidavit containing the charge that defendant abandoned the land at the time of her marriage.

The plaintiff having failed to show a present subsisting right to the possession of the land involved superior to that of the defendant, who has an entry of record, your office decision is affirmed.

BRADY ET AL. *v.* WILLIAMS.

Motion for rehearing in the case above entitled denied by Secretary Bliss, November 23, 1897. See departmental decisions of December 23, 1896, 23 L. D., 533, and July 24, 1897, 25 L. D., 55.

HOMESTEAD ENTRY—DESERTED WIFE—FINAL PROOF.

MARTHA M. OLSON.

Where a deserted wife has submitted final proof on her husband's homestead entry, and by departmental decision is required to submit new proof, but does not do so, and the record does not show that she was notified of such requirement, the entry cannot thereafter be properly canceled for failure to submit final proof within the statutory period, except after due notice to the wife.

Secretary Bliss to the Commissioner of the General Land Office, November (W. V. D.) 23, 1897. (H. G.)

On June 15, 1882, Gustave Olson made homestead entry for the W $\frac{1}{2}$ of NW $\frac{1}{4}$ and W $\frac{1}{2}$ of SW $\frac{1}{4}$ of Sec. 12, T. 146 N., R. 58 W., in the land office at Fargo, Dakota (now North Dakota).

October 23, 1885, the said Martha M. Olson, as agent for said Gustav Olson and as his deserted wife, gave notice by publication of her intention to make final proof in support of the claim of her said husband before the clerk of the district court at Cooperstown, Dakota, on December 8, 1885. This proof was not made at the time, but was taken eight days later on December 16, 1885, the clerk of the district court certifying that such testimony was taken in the absence of the judge of said district court, and that no objection to such proof was made by any person. The excuse given by Mrs. Olson for not appearing at the time advertised for taking such proof in her affidavit is as follows:

I was not aware of the date set for taking testimony in this proof was December 8, 1885, that I had expected to be notified of that date by my attorneys, but did not learn thereof before yesterday; that I am in poor health and unable to stand much travel in cold weather, and I therefore respectfully ask that this delay be overlooked.

On February 1, 1886, this proof was transmitted to your office by the receiver of the local land office, with the following statement and recommendation in his letter of transmittal, viz:

It appears from the affidavits and other evidence submitted that Martha M. Olson is a deserted wife, and as such seeks to make final proof for the above tract as the agent of Gustav Olson. Her husband deserted her in January, 1883. She had resided on this land with her husband since the spring of 1880, but in consequence of the desertion of her husband she became sick and unable to remain on the land with her children, and she removed to the house of her parents in the same section. She was subsequently removed to the asylum at Yankton, D. T., where she remained until August, 1885. The children during the meantime remained with the parents of the mother, Martha M. Olson, adjoining the tract above described. There are eleven acres broken on the tract which has been cropped four seasons. The improvements, although meager, are probably all that could be expected under the circumstances. A woman left alone with five small children is not well fitted, to say the least, to live up to the full letter of the law in the matter of residence and cultivation. Especially is this true of Martha M. Olson in the condition in which she was left by her husband in January, 1883. We transmit with this proof, several affidavits which were filed in this office at that time or about that time which show that Gustav Olson was a drunken, worthless fellow, with little or no disposition to do anything towards the support of his family, and also requesting us to refuse any relinquishment of his entry should he present one to this office for acceptance. Such a relinquishment he did subsequently present to this office, but in view of all the circumstances then before us we refused to accept the relinquishment, and it was sent to his wife. We are confident that had we accepted it at that time, it would have taken from the wife and children the last remaining source from which they could hope to support themselves. It will be seen from this and other facts in the case that it is surrounded with considerable hardship, and a case in which the principles of equity, rather than a strict interpretation of the law, should prevail. The testimony in the final proof presented was not taken on the day advertised, but we believe that this failure is satisfactorily explained. For this reason we transmit the proof and other papers to your office, believing that in other respects it is entitled to our approval. The case, as a whole, would seem to be one which might properly come before the board of equitable adjudication, and if that channel be considered the proper one, the claimant's attorney desires that it may receive the consideration of the board.

On March 6, 1886, this proof was rejected by your office, and on May 17, 1886, an appeal was taken to the Department on behalf of Mrs. Olson "by N. B. Patten and Ole Serumgard, her attorneys," and it

appears in the letter from the local office transmitting said appeal that the "attorney of Martha M. Olson" was notified of the said decision of your office.

On November 9, 1887, this Department modified the decision of your office, holding that the absence of Mrs. Olson from the land caused by sickness and poverty, and during her confinement in the asylum was excusable, and that such periods should be properly estimated as part of the required five years of residence, but finding that the excuse for making failure of proof on the day advertised was not sufficient and that for such reason, new proof should be made. It was "suggested" further that the character and extent of the cultivation and use of the land during Mrs. Olson's absence therefrom be fully shown in the new proof, and when the final proof should be thus made, the entry should be referred to the board of equitable adjudication for confirmation. (Martha M. Olson, 6 L. D., 311).

On November 29, 1887, the local officers were notified of such departmental decision, but it is contended that no service of the notice of such decision was ever made upon Mrs. Olson or her husband, and that shortly after making her final proof, which was made during a lucid interval while she was out on parole, she was taken back to the asylum at Yankton, and from that place was on May 25, 1885, transferred to a like institution for the insane at Jamestown, (North Dakota) where she has ever since been confined. No record of the service of notice of the decision of the Department appears from the record of your office upon either Mrs. Olson, her husband or her attorneys or upon any person acting for her or her husband. As the records of the land office at Fargo, North Dakota, were destroyed by fire on June 7, 1893, and no report was ever made of the service of notice of the said decision, it does not affirmatively appear that such decision was ever communicated to any of the persons named.

On March 21, 1894, notice issued from the local land office to Gustav Olson, the husband, to show cause why his entry should not be canceled for failure to make final proof within the statutory period, nearly twelve years having elapsed since the date of his entry. This notice was in usual form and was directed to the entryman at Pickert, North Dakota, instead of Mardell, in the same State, the latter post-office being nearest the land, the one where the Olsons had received their mail for many years, and the one given by Mrs. Olson in her final proof.

No notice appears to have been given to Mrs. Olson, who made the final proof, and it seems that Gustav Olson, her husband, after deserting her, and endeavoring to file his relinquishment for the land, absconded.

The registered letter was returned unclaimed, and upon report from the local office, your office on June 2, 1894, canceled the entry of Gustav Olson.

On November 25, 1895, one Lars Olson made homestead entry for the tract, and is now the only entryman of record therefor.

On April 8, 1896, Iver I. Seim, as guardian of Martha M. Olson, an insane person, presented at the local office a petition, addressed to your office, verified by his oath and corroborated by two witnesses, showing that letters of guardianship were granted to him on February 11, 1896, of the person and estate of Martha M. Olson, insane, by the county court of Griggs county, North Dakota, the county wherein said insane person has had a residence, either actual or constructive, since 1882.

The facts, as detailed in the foregoing statement, appear in substance in this petition, which sets forth, upon information and belief, that neither Mrs. Olson nor her attorneys received any notice of the disposition of her final proof by the departmental decision. The guardian alleges that as soon as he learned that Lars Olson had made homestead entry of the tract, he at once took legal steps to secure his (Seim's) appointment as guardian of the person and estate of Mrs. Olson, that he does not know the residence of Gustav Olson, the husband of his ward, and that said Olson has not contributed to the support of his family since he left them in January, 1883.

He asks that a hearing be ordered to the end that Mrs. Olson may be re-instated in her rights and permitted to make final proof for said tract, and that the entryman, Lars Olson, be cited to appear to show why his entry should not be canceled and for other and further relief.

On May 23, 1896, your office denied this application, and the guardian of the estate of Mrs. Olson appeals. He submits with his appeal papers, his letters of guardianship, thus supplying an omission to which your office referred in its decision.

Your office held that, inasmuch as Mrs. Olson's appeal to the Department from the adverse decision of your office rejecting her final proof was filed by her attorneys, on May 19, 1896, "it is a reasonable presumption that if they had not received notice of the Secretary's decision, they would have made some inquiry in regard to the same during the ten years that have expired since the letter was filed," and therefore your office is of the opinion that "the regularity of the service of notice of said decision can not at this late day be questioned."

In said decision, your office further holds that it was error on the part of the local office to send notice of such decision to Pickert, instead of Mardell, North Dakota, as the latter post office is nearer the land in question, but as the statutory period for making proof on said entry has long since expired, that even if the entry were reinstated, and a proper compliance with the homestead law, with that exception shown, it could only be passed to patent after confirmation by the board of equitable adjudication, and that this can not be done, as the Department has no power by rule, regulation or otherwise, to extend the time for making final proof; and, in the presence of an adverse claim, an entry can not be submitted to the board of equitable adjudication when

the proof is made after the expiration of the statutory period, and the cases of *Cooke v. Villa* (17 L. D., 210,) and *Ayers v. Brownlee* (15 L. D., 550,) are cited as announcing this rule.

It seems that your office is misled as to the matter of notice of the decision of the Department of November 9, 1887, as it was not notice of that decision, but a notice addressed to Gustav Olson to show cause why his entry should not be canceled, that was sent to the wrong post office. It appears that no report was made by the local office to your office of the service of the notice of the departmental decision requiring proof to be taken anew. A report was made showing that the registered letter addressed to Gustav Olson, notifying him to show cause why his homestead entry should not be canceled was returned unclaimed. Mrs. Olson, in the final proof she made as the deserted wife of the entryman, gave her address as Mardell, Dakota, but the notice to show cause why the entry of her husband should not be canceled was addressed to her husband at Pickert, Dakota, which was not the post office nearest the land, nor the one where the entryman and his family received their mail for many years.

No reason appears of record why this communication was forwarded to the post office at Pickert, instead of Mardell, or why it was not addressed to Mrs. Olson.

It is well settled that notice of a decision to an attorney of record is notice to the party that he represents. *Dober v. Campbell et al.* (17 L. D., 139); *Nichols v. Gillette* (12 L. D., 388). It is equally well settled that the service of notice must affirmatively appear. *Edward B. Largent* (13 L. D., 397). It is true that the records of the local office were destroyed by fire, June 7, 1893, but this was over five years after the service of notice of the departmental decision was made, if it ever was made.

While it is a presumption, generally, that official duty is regularly performed, it appears that it was not performed in this case by the local office, for no return was made of the service of such departmental decision, if ever made. The presumption, at best, is a disputable one, and could hardly attach in this case, even if it were conclusive. The departmental rule requires that service of such notice shall affirmatively appear, and it does not appear in the files of the case, which were transmitted by the local office to your office, and which should contain a return of such service, if ever made. The petition for a hearing states that no service was made upon Mrs. Olson or her attorneys of the departmental decision requiring new proof, but this allegation is made upon information and belief, and is not corroborated by positive testimony showing the lack of such service. It is corroborated, however, by the state of the record of the case in your office, showing no return of service of notice of such decision; and if any inference can be indulged in as to the service upon Mrs. Olson thereof, it would be that the local office, if it ever forwarded any notice, sent that also to the wrong

address, and addressed it to Gustav Olson, the husband, when it should have been directed to Martha M. Olson, who made the final proof as his deserted wife, and who was called upon in the departmental decision to furnish new proof. It is probable that proper service could have been made upon the attorneys of Mrs. Olson, who appeared for her and prosecuted her appeal, upon which the departmental decision was made.

That this was not done is charged in the petition for a hearing, upon information and belief, it is true, but corroborated in that respect also by the record in the case in your office, which does not show any return of such service. It is impossible to ascertain the state of the record in the local office, as all records therein were destroyed by fire, but this casualty occurred long after return ought to have been made, and it appears that no such return was ever made to your office.

The cases cited in your office decision (*Cooke v. Villa*, 17 L. D., 210; *Ayers v. Brownlee*, 15 L. D., 550,) relate to the rule forbidding the reference of the case to the board of equitable adjudication, after the statutory period for making entry has expired and there is an adverse claim to the tract.

If in this case the service of notice to show cause why his entry should not be canceled was attempted to be made upon Gustav Olson, the original entryman, instead of upon his deserted wife, who made the final proof, was directed to the entryman at a post office other than the one where he and his family received their mail for many years, and not the nearest one to the land, and was returned unclaimed, the entry was not properly canceled, and the subsequent entry of Lars Olson for the tract is not a valid adverse claim; and the decisions cited do not apply. However, upon this point no opinion need now be expressed, as this proceeding is an *ex parte* application, to which the said subsequent entryman is not a party, and of which he has had no notice.

Your office decision refusing a hearing is reversed. You will order a hearing before the local office, upon the facts stated in the petition, and direct that the guardian of the person and estate of Martha M. Olson and Lars Olson, the present entryman, be notified thereof.

INDIAN LANDS—LEASE—ACT OF FEBRUARY 28, 1891.

UINTAH LANDS.

The act of February 28, 1891, authorizing Indians who are occupying lands they "have bought and paid for," but that are not needed for farming or agricultural purposes, and are not desired for individual allotments, to lease such lands, subject to the approval of the Secretary of the Interior, includes within its intendment the Indians on the Uintah reservation who surrendered valuable rights to procure a permanent home on said reservation, and may therefore be properly regarded as having "bought and paid for" said lands.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
November 17, 1897. (W. C. P.)

In response to your request for an opinion in the matter of the lease of certain lands within the Uintah Indian reservation in Utah, I would respectfully submit the following:

On February 7, 1893, a contract was made by which the Uintah and White River Utes, acting through the Council and principal chiefs, agreed to lease to William A. Perry and James T. McConnell "all that part of the Uintah reservation, Utah, lying south of the Strawberry river, west of the guide meridian and south of the first standard parallel south in Wahsatch county," for the term of ten years, for the purpose of prospecting and mining for ellaterite, gilsonite, asphaltum and all other kinds of valuable mineral, in consideration of which the lessees agreed to pay one dollar for each ton of mineral mined or removed. This lease was approved by the Secretary of the Interior, August 23, 1893, subject to various conditions of which only the following need be mentioned, viz.: That the amount of land leased should be limited to five thousand acres to be selected by the lessees in no more than three tracts, the selection thereof to be made on or before December 1, 1893, and maps or plats thereof to be filed in the Indian Office on or before January 1, 1894; that the lessees, their heirs, administrators or assigns should begin actual mining operations on said land on or before May 1, 1894, and should prosecute the same with due diligence; that the failure in either of these last two regards should subject the lease to forfeiture after due notice.

The conditions named in this approval were accepted by the lessees on August 23, 1893, and on the same day an assignment of said lease by the lessees to the American Asphalt company, theretofore made, was approved by the Secretary of the Interior, upon condition that said company should file a bond in the sum of \$5,000 conditioned upon the faithful performance of the obligations assumed by the lessees and should accept the conditions named in the approval of said lease. On the same day the company signified its acceptance of the conditions of approval and also filed a satisfactory bond.

On November 8, 1893, the company applied for an extension of time for filing plats of its selection and the same was granted, the time for

making selections being extended until July 1, 1894, and for filing plats thereof until August 1, 1894. On July 30, 1894, the company asked for a further extension of time until August 3, for filing the plats, stating that their agent had been delayed on his way from the west and could not reach New York with the necessary data in time to prepare the maps for filing on August 1. With this letter were filed two telegrams, said to be from their agent T. J. Schofield; the first dated at Clear Creek, Utah, July 25, 1894, saying: "Start tonight," and the other dated at Chicago, July 29, saying: "Been delayed. Just in tonight. Will leave for New York tomorrow." The plats were filed in the Indian Office on August 4, 1894. On the 13th of that month the company filed an affidavit of Robert B. Nooney, as follows:

Robert B. Nooney being duly sworn, says that he is President of the American Asphalt Company of Colorado. That the agent of the company in Utah, to wit, Thomas J. Schofield, left Clear Creek, Utah, for New York City with the data on which to prepare the map of definite location, which the company was to file in the office of the Commissioner of Indian Affairs on or before August 1st, 1894, in time to enable said company to make and file the map on or before said date, if he, said Schofield, was not unduly detained on his journey. That said Schofield did not arrive in New York City until late on the evening of July 31st, and reported that he was detained by missing connections and a railroad accident, and as he is a truthful man, deponent believes his statements. That said company prepared said map at once on his arrival and filed it in the office of the Commissioner of Indian Affairs on August 4th, at 10:30 a. m. That said company has acted in the best of faith in the matter and but for the unavoidable delays of said Schofield on his journey to New York said map would have been filed on or before August 1st.

The letter of the company of July 30, 1894, was received in the Indian Office on July 31, and on the same day the Commissioner telegraphed in reply thereto, as follows:

The Secretary of the Interior positively declines to extend the time for the filing of maps by American Asphalt company.

No further action seems to have been taken in the premises except that the agent in charge of said reservation, acting under instructions from the Commissioner of Indian Affairs, has refused to allow the representatives of the said company to go upon the land for the purpose of taking out mineral or prosecuting any work there.

The company now asks that the default in filing its plat be excused and waived and that the plats be now approved and the lease recognized as in force upon such conditions, especially as to security for the performance of the company's obligations as may be just and proper.

This lease was made under the provision to section three of the act of February 28, 1891 (26 Stat., 794), which reads as follows:

That where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing or ten years for mining purposes, in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior.

This provision has not been modified, except by extending it to farming purposes by the act of August 15, 1894 (28 Stat., 286-305).

In determining whether the Indians on the Uintah reservation have such a right in and to the lands within its boundaries as to make the provisions of said act of 1891 applicable thereto it is necessary to examine the treaties, agreements and laws relating thereto. The policy of concentrating the Indians of Utah as much as practicable was adopted early in the history of governmental dealings with them. Treaties were made with many of the different tribes or bands by which they agreed to remove to specified reservations as soon as the same should be set apart for them. Among these may be mentioned that with the Utah tribe, in 1849 (9 Stat., 984) and that with the Shoshonee-Goship bands in 1863 (13 Stat., 681). While these treaties did not describe fixed reservations they do show the policy in force, and the reports of the Commissioner of Indian Affairs for that period not only show that this policy was adhered to but that the Indians of Utah were as a fact gradually concentrated in this neighborhood.

By order of October 3, 1861, the President directed that the entire valley of the Uintah River in Utah Territory be reserved and set apart as an Indian reservation.

By the act of May 5, 1864 (13 Stat., 63), the Secretary of the Interior was authorized and required to cause the several Indian reservations in Utah theretofore made or occupied as such, excepting Uintah valley, to be surveyed and sold and to apply the proceeds of such sales for the benefit of the Indians. It was also directed by section two:

That the superintendent of Indian Affairs for the territory of Utah be, and he is hereby, authorized and required to collect and settle all or so many of the Indians of said territory as may be found practicable in the Uinta valley, in said territory, which is hereby set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same.

By the act of June 18, 1878 (20 Stat., 165), that part of the act of May 5, 1864, directing the sale of Indian reservations in Utah was repealed and it was directed that those lands be restored to the public domain and disposed of as other public lands.

By the act of February 23, 1865 (13 Stat., 432) the President was authorized to enter into treaties with the various tribes of Indians in Utah Territory to secure the absolute surrender of all their possessory right to agricultural and mineral lands in said Territory, except such agricultural lands as may be set apart by said treaties for reservations for said Indians.

I find a statement in the report of the superintendent of Indian Affairs for Utah for the year 1867, that a treaty was made with nearly all the bands of Utah Indians in 1865, but that it had not then been acted upon. This treaty seems never to have been confirmed by the Senate and no further action seems to have been taken under the provisions of said act of 1865.

By the act of June 15, 1880 (21 Stat., 199), an agreement with the confederated bands of Ute Indians was ratified. By this agreement said Indians ceded to the United States all their lands in Colorado, except certain reservations therein provided for and the White River Utes agreed to remove to and settle upon agricultural lands on the Uintah reservation in Utah. They did remove to this reservation and have since resided there.

The rights of the Indians residing upon this reservation have come before this Department for consideration several times, and before the supreme court of Utah, and have necessarily been considered by Congress in connection with legislation affecting them.

In 1887 the rights of these Indians were recognized by the President when a military reservation was established within the boundaries of the Indian reservation with a proviso as follows:

Provided, That the use and occupancy of the land in question be subject to such right, title and interest as the Indians have in and to the same, and that it be vacated whenever the interests of the Indians shall require it.

It was held by this Department that the Indians on the Uintah reservation had "bought and paid for" their lands when a grazing lease to Charles F. Homer was approved and also when the mining lease now under consideration was approved. The correctness of this conclusion was raised before the supreme court of Utah in the case of Strawberry Valley Cattle Co. v. Chipman, decided June 3, 1896 (45 Pac. Rep., 348), which directly involved the validity of the Homer lease. It was there contended that these Indians had not "bought and paid for" their lands and that the alleged lease was void on the ground that there was no authority of law for making it. After a reference to the treaties, agreements and laws relating to this reservation and the action of this Department under said law of 1891 and a discussion of the question, a conclusion was reached by the court as follows:

We conclude that the lands in question in this case are comprehended within the terms of the act of February 8 (28), 1891, and hold that the lease in question was sufficiently executed and is valid.

The court specifically referred to the agreement by virtue of which the White River Utes removed to this reservation, and after stating the fact that these Indians had given up to the government their possessions in Colorado, said:

It would seem clear that the surrender of these valuable possessions was a sufficient consideration to characterize the lands which they acquired by the exchange as 'bought and paid for' under the act of February 28, 1891, and the fact that the Uintah reservation had already been purchased and accepted by the Utah Indians could not change the character of the transaction. If the Utah Indians were content to receive their Colorado brethren and share with them the United States had no cause to complain.

The Department has in other connections considered the character of the claim of these Indians to the lands embraced in their reservation, and it seems proper to briefly notice these instances.

In 1893 the Secretary of the Interior submitted to the Assistant Attorney-General the question:

What are the relations of the Uintah and Uncompahgre Indians to the lands they occupy?

The Assistant Attorney-General in his opinion of October 23, 1893 (10 Op. A. A. G., 122), after referring to various treaties and acts of Congress referring to these Indians, and especially the act of May 24, 1888 (25 Stat., 157), providing for the sale of a portion of said reservation, the consent of the Indians being first obtained, and that the money arising therefrom should be placed to the credit of said Indians, said:

In my opinion this act of Congress, which directed the sale of a certain portion of the land in the reservation provided the Indians should agree to the same and that the money arising from the sale of such lands should belong to said Indians, to be paid into the treasury of the United States, to be held for them as a trust fund, clearly shows that Congress treated these Indians as the *owners* of this land.

Again he said:

It has been repeatedly ruled that Indians who are in possession of lands that have been given to them by the United States, for permanent occupancy, where Congress has recognized the right and title of the Indians to such lands, hold said lands as purchasers having paid for the same, in the sense in which the words, 'have paid for the same,' are used in the act of 1891 (*supra*). I am of the opinion, therefore, that the Uintah Indians have title to the lands which they occupy.

Afterwards, the Committee on Indian Affairs, House of Representatives, submitted to this Department a bill then pending relating to the Uintah and Uncompahgre reservations asking for a full statement of the condition of the Indians occupying said reservations, the nature of their title to the same, and the opinion of this Department as to the propriety of the proposed legislation. This was referred to the Assistant Attorney-General, who in his opinion of February 16, 1894 (10 Op., A. A. G., 271), adhered to the conclusion reached in the opinion of October 23, 1893, *supra*, as to the status of the Uintah reservation and expressed the opinion that "Congress should make no enactment disposing of those lands except with the consent of the Uintah Indians." In his report (Indian Division, Record of Letters sent, Vol. 81, page 38) the Secretary, after expressing his views as to the Uncompahgre reservation, said:

With regard to the Uintah reservation the facts are somewhat different. I concur in the opinion of the Assistant Attorney-General that these Indians have a title to the lands which they occupy, which should be acquired by the United States only by negotiations with them for that purpose. A commission might properly be authorized to conduct such negotiations on the part of the government.

He declined to recommend the passage of the bill submitted to him or of a bill prepared in the Indian office as a substitute therefor, but advised that legislation should be enacted in accord with the plan suggested in said report.

Congress evidently accepted the views thus suggested as correct, because in the act of August 15, 1894 (28 Stat., 286-337) it was provided

that the President should appoint a commission to make allotments to the Uncompahgre Indians and to negotiate with the Indians properly residing upon the Uintah reservation for the relinquishment to the United States of the interest of said Indians in all lands within said reservation not needed for allotment in severalty to said Indians. No agreement has, however, been negotiated under this authority.

It is clear that the Indians on this reservation gave up what were to them valuable rights for the purpose of securing a place for permanent homes, and some of the White River Utes relinquished rights to land in Colorado which had been guaranteed them by treaty stipulation. It would seem thus, that they may very justly be considered as Indians who are occupying lands which they "have bought and paid for" within the purview of said act of 1891. The fact that this has heretofore been held by the supreme court of Utah, the State within which the lands are situated, is a persuasive argument in favor of the same conclusion by this Department. Again the fact that the holding of this Department has always been in favor of such ownership in these Indians tends strongly in favor of that conclusion now.

I am of the opinion that these Indians come within the purview of the act of 1891, and are authorized to lease their lands in accordance with the provisions thereof relating to the leasing of lands not needed for farming purposes or for individual allotments.

While the application made July 30, 1894, for an extension of the time for filing plats was denied by the Secretary July 31, yet the maps filed August 4, following, have not been formally approved or rejected, and the question as to what action shall be taken upon them is still an open one. There was a failure to file the maps within the time agreed upon and according to the conditions expressly imposed by the Secretary at the time of the approval of the lease and expressly accepted by the lessee, a forfeiture may be declared because of this default. There has been no declaration of forfeiture and neither has there been any action which waives the default or prevents a forfeiture at this time. The question as to the advisability of such a course is purely administrative in character, resting in the sound discretion of the Secretary.

The papers in connection with the matter are herewith returned.

Approved: November 17, 1897.

C. N. BLISS, *Secretary*.

APPLICATION FOR SURVEY—ISLAND.

JOHN C. CHRISTENSEN.

An application for the survey of an island lying in a meandered non-navigable stream will not be allowed.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 19, 1897. (C. W. P.)

On June 23, 1896, you submitted the application of John C. Christensen for the survey of an island in the Platte River, in sections 9 and

16, township 8 N., range 15 W., 6th P. M., Nebraska, within the abandoned Fort Kearney military reservation.

From the application of Mr. Christensen it appears that the island he desires to have surveyed contains about fourteen acres; that the width of the channel on either side between the island in question and other islands is from twenty-five to one hundred and fifty feet, and the depth of the river at ordinary stages of the water about half a foot to two feet: that the island is about two feet above high water mark, and not subject to overflow, and the land fit for agricultural purposes. The application appears to have been served upon the riparian claimants, who acknowledged the service of said notice.

The Platte River in Nebraska is a wide shallow stream, enclosing many islands, and has a small volume of water compared with its length. The water is so shallow and the channel so shifting that it is not navigable even for small vessels. (Lippincott's Gazetteer, edition of 1880, page 1762.)

The township was surveyed in November, 1877, and the official plat of the survey of the township shows an unsurveyed island in the locality described in the application and represented upon the diagram submitted by the applicant, and in fact there are a number of unsurveyed islands in the Platte River shown upon the official plat of township 8 N., range 15 W., as shown by photolithographic copy of plat accompanying your letter. It does not appear why the lines of the public survey were not extended over this island.

Two applications for the survey of an island in sections 9 and 10, near the island described in the application now under consideration, were approved by the Department by letter to your office, dated March 22, 1895, and this action was taken notwithstanding a protest against the approval of the applications by T. T. Cleland and nine others, who claimed the unsurveyed islands under the laws governing riparian rights. See Press Copy, Misc., No. 304, p. 135.

You recommend that this application be approved and the survey ordered,

unless the Department may deem it not proper to order the survey made, in view of the principles laid down by the U. S. supreme court in the case of Grand Rapids and Indiana Railroad Company *v.* Butler, decided June 3, 1895, 159 U. S., 87,

to which my attention is directed.

It was held in the case of the State of Idaho, 16 L. D., 496 (syllabus):

An order for the survey of an island in a meandered river may be properly made, where it appears that said island existed substantially at the date of the survey of the riparian lands as at present, and should have been included then in the public surveys.

This decision was approved in the case of Frank Level *et al.* (21 L. D., 290), decided July 3, 1895. But on June 3, 1895, was decided by the supreme court the case of Grand Rapids and Indiana Railroad Company *v.* Butler, referred to in your office letter.

That case came before the United States supreme court upon a writ

of error to the supreme court of the State of Michigan. The supreme court of Michigan held that the well-recognized rule in Michigan was that a grantee of land bounded in the deed of conveyance by a stream takes title to the land under the water to the thread of the stream in the absence of an express reservation; that reservation cannot be implied; that when the government has surveyed its lands along the bank of a river and has sold and conveyed such lands by government subdivisions, its patent conveys the title to all islands lying between the meander line and the middle thread of the river, unless previous to such patent it has surveyed such islands as governmental subdivisions or expressly reserves them when not surveyed; that the grant to Lyon and Hastings was made under the survey of 1831, by which, as the court found, "both banks of Grand River were meandered and by which the middle thread of the river was fixed west of this island;" and that the grant clearly vested in them title to the land in controversy, of which no subsequent survey by the government could deprive them.

The errors assigned are grouped by counsel, and stated thus: That the point that the land in question, even though an island, passed to Lyon and Hastings under their patent, if not reserved, was not properly before the court under the pleadings; that "the court erred in holding as matter of fact, on this record, that the island was not reserved in the Lyon and Hastings patent;" and that "the court erred in holding, upon this record, that Island 5 passed to Lyon and Hastings under the patent to them in 1833 of the north fraction of the southeast $\frac{1}{4}$ of section 25, township 7-12."

The state court, however, held the pleadings sufficient to permit of the examination and determination of the point on which its decision turned, and that conclusion involved no federal question.

The United States supreme court say:

And as to the second proposition, it may be said that while the rule is that this court, upon a writ of error to the highest court of a state, in an action at law, cannot review its judgment upon a question of fact, *Dower v. Richards*, 151 U. S., 658, it is unnecessary to consider the extent of the power of this court, in that particular, in chancery cases, as we entirely concur in the result reached by the state court that there was no such reservation, and in its findings as follows: "In the present case there is no act on the part of the government showing any intention to reserve this land. The only inference that can be drawn from the facts is that the government agents, its surveyors, did not consider it of sufficient value to survey. It was not surveyed until about twenty-five years after the survey of 1831, and not till nearly twenty years after the survey of 1837, when the other islands and the lands upon the west bank were surveyed, thus completing the survey in that region."

The inquiry is reduced then to this, did the court err in holding as matter of law, upon this record, that the grant vested in Lyon and Hastings the title to the particular land in controversy?

And held, after reviewing the case of *Hardin v. Jordan* (140 U. S., 371), and other cases:

We have no doubt upon the evidence that the circumstances were such at the time of the survey as naturally induced the surveyor to decline to survey this particular

spot as an island. There is nothing to indicate mistake or fraud, and the government has never taken any steps predicated on such a theory; and did not survey the so called Island No. 5 until twenty-five years after the survey of 1831, and nearly twenty years after that of 1837.

And that:

The supreme court of Michigan was right in holding that whatever there was of this conformation passed under the grant to Lyon and Hastings.

It is held in *Hardin v. Jordan (supra)*, as well as in the case of *Grand Rapids and Indiana Railroad Company v. Butler*, that the question of the riparian rights of grantees by the United States of the public lands bounded on streams, and other waters, made without reservation or restriction, is to be construed according to the law of the State in which the land lies.

In this case the land lies in the State of Nebraska. The supreme court of Nebraska, in the case of *Wiggenhorn v. Kountz*, 25 Nebraska, 690, said:

There is no doubt that grants of land bounded upon a river not navigable carry with them the exclusive right and title to the grantees to the centre of the stream, unless the terms of the grant clearly denote the intention to stop at the edge or margin of the river, the rule of the common law being that proprietors of land adjoining public rivers, not affected by the flow of the tide, own the soil *ad flum aquae*.

And in the case of *Clark v. Cambridge and Arapahoe Irrigation Company*, 45 Nebraska, 798, it is said that the common law rule as to navigability is not as a rule accepted in this country, but that here navigability in law is synonymous with navigability in fact, without regard to the influence of the ocean tide, and includes those waters only which afford a channel for useful commerce; and it was held in that case that the courts of Nebraska will take notice without proof that the Republican river is unnavigable.

In view of these decisions, the application for the survey of this island must be denied, and the decision in the case of *Noah W. Shreve and Angelo J. Chidester* (Press Copy, Misc. No. 304, p. 135,) will not hereafter be followed as a precedent.

PRACTICE—NOTICE OF APPEAL—CONSOLIDATED CASES.

KORSMOE v. NORTHERN PACIFIC R. R. CO.

Prior to the consideration of an appeal from a decision rendered on consolidated cases, notice thereof should be given to all parties recognized as having rights adverse to the appellant.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 23, 1897. (G. B. G.)

On October 14, 1896, your office held that the indemnity selection of the Northern Pacific Railroad Company, for the SE. $\frac{1}{4}$ of Sec. 33, Tp. 135 N., R. 43 W., St. Cloud, Minnesota, was invalid. By the same

decision the application of Gustav G. Korsmoe, to make homestead entry for the tract, was rejected, and the application of one Per Nilson to make homestead entry of the same tract was "held for allowance."

Korsmoe appealed from said decision, serving a copy of his appeal on counsel for the Northern Pacific Railroad Company, but did not serve Nilson with a copy thereof. The railroad company did not appeal.

The Department is now in receipt of a motion by counsel for Nilson to dismiss the appeal of Korsmoe, for the reason that a copy of the same was not served on Nilson, as required by rule 86 of practice.

The fact that the land applied for by Nilson is the same land in controversy between Korsmoe and the Northern Pacific Railroad Company is doubtless the reason why his application was made part of the record in this case. The case arose on the application of Korsmoe to enter the land on the 18th day of February, 1895. It being embraced in a pending indemnity list of the Northern Pacific Railroad Company, a hearing was ordered. The local officers decided in favor of Korsmoe, and on the appeal of the company your office, as has been seen, denied both claims.

Counsel for Korsmoe seems to have entirely misapprehended the scope of the decision of your office. His specification of errors on appeal proceeds on the theory that said decision was in favor of the railroad company. It is not the purpose of the Department to consider this case on its merits at this time, but it would not be just to the appellant to dismiss his appeal because he has failed to serve a copy thereof on Nilson, who was not a party to the litigation. But owing to the irregular consolidation of Nilson's application with the record in this case and a decision in his favor, he is entitled to be heard before the Department, in answer to Korsmoe's appeal, if he so desires.

It is therefore directed that your office notify Korsmoe that he will be required to serve Nilson with a copy of his appeal and specification of errors, and make due return thereof within thirty days from this date. The usual time will be allowed for answer.

CERTIFICATION AND PATENT—SWAMP LAND CLAIM.

STATE OF WISCONSIN.

The Department is without jurisdiction to order a hearing, on the application of a State, to determine the character of lands claimed by it under the swamp grant, where, prior to any such claim, the lands have been certified or patented to the State for the benefit of a railroad grant.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 23, 1897. (F. W. C.)

The appeal filed on behalf of the State of Wisconsin from your office decision of April 9, 1897, denying its application for a hearing to estab-

lish the swampy character of the following described lands, has been duly considered, viz:

The NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 18 N., R. 1 E., approved to the State for the La Crosse and Milwaukee Railroad Company December 18, 1863;

The W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 21, T. 18 N., R. 1 E., approved to the State for the La Crosse and Milwaukee Railroad Company December 18, 1863;

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 33, T. 18 N., R. 1 E., approved to the State for the La Crosse and Milwaukee Railroad Company December 18, 1863;

The SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 19, T. 19 N., R. 1 E., approved to the State for the La Crosse and Milwaukee Railroad Company December 18, 1863;

The SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 25, T. 21 N., R. 4 W., approved to the State for the La Crosse and Milwaukee Railroad Company December 18, 1863;

The NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 27, T. 38 N., R. 14 W., approved to the State for the St. Croix and Lake Superior Railroad Company May 6, 1865, and awarded to Farm Mortgage Co.;

The SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 27, T. 33 N., R. 16 W., approved to the State for the St. Croix and Lake Superior Railroad Company December 1, 1862;

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 7, T. 27 N., R. 5 W., patented to the State for the West Wisconsin Railroad Company August 24, 1872;

The NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 1, T. 27 N., R. 6 W., patented to the State for the West Wisconsin Railroad Company August 24, 1872;

The SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 35, T. 24 N., R. 1 E., patented to the State for the Wisconsin Central Railroad Company January 11, 1877 (No. 5);

The SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 35, T. 24 N., R. 1 E., patented to the State for the Wisconsin Central Railroad Company January 11, 1877; and

The NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 26 N., R. 1 E., patented to the State for the Wisconsin Central Railroad Company January 11, 1877.

All the above described lands have been certified or patented to the State on account of grants to aid in the construction of railroads, and opposite each tract is noted the date of the certification or patent to the State and the road on account of which the same was made.

It was because of said outstanding certifications that you denied the application for hearing.

It will be seen from the above list that the earliest certification was in 1862 and the latest patent in 1877.

The State of Wisconsin agreed to take its swamp land according to the field notes of the public surveys, and selections were made of portions of all the sections above described, with one exception, before the

certifications or patents on account of the railroad grants, and none of said lists embraced any of the tracts here involved.

In accordance with an agreement entered into in 1880, between the governor of Wisconsin, the Secretary of the Interior and the Commissioner of the General Land Office, a representative of the State, together with a clerk from this Department, examined the field notes of the lands within the State of Wisconsin and prepared lists of those lands found to be swamp lands within the meaning of the act of September 28, 1850.

Their report is on file in your office and contains all of the above described lands.

Patents issued to the State for those lands reported by the examiners as swamp, as far as clear, but as to the above described tracts the State's claim was rejected by your office letter "K" of September 12, 1895.

From said rejection the State failed to appeal, but on April 21, 1896, filed its application, under consideration, for a hearing, in order to establish, by parol evidence, the swampy character of these lands.

This appeal does not appear to have been served upon the companies for whose benefit the certifications or patents were issued, or their successors.

It is alleged in the appeal, however, that the State has never patented these lands to the railroad companies interested, that the field notes show them to be swamp in character, and, therefore, the State holds the equitable title under the swamp grant and holds the naked legal title by reason of the conveyances from the United States under the railroad grants.

It is therefore proposed that the State reconvey the title conveyed on account of the railroad grant, and that patent then issue to the State under the swamp grant.

From what has been said it is clear that the State never made formal claim to any of the lands here involved until the examination made of the field notes in 1880 and 1881, by the representatives of the State and this Department under the agreement before referred to, resulted in their return as swamp land.

This agreement was many years after the United States had certified and patented the lands on account of the railroad grants.

Such certificates and patents recite a finding that the lands covered thereby are a part of the unappropriated lands within the limits of the railroad grant, which is in effect a determination that they are not a part of the prior grant to the State of swamp lands.

By the certifications and patents the lands passed beyond the jurisdiction of this Department.

As said in the case of the State of Iowa *v.* Railroad Companies (Copp's Land Laws, 1882, Vol. 2, p. 959):

While I am not prepared to admit that the Department loses jurisdiction to act in every case where lands have been certified or patented, I am of the opinion that it should be exercised only in extreme cases, where without its exercise the party entitled to the land would be remediless.

Your office decision refers to the decision of the supreme court in the case of *McCormick v. Hayes* (159 U. S., 332), in which it was held that parol evidence will not be admitted to show that lands were in fact swamp and overflowed, in opposition to the concurrent action of the Federal and State officers having authority in the premises.

The action of your office in denying the application for a hearing is affirmed.

PRACTICE—APPLICATION—NATURALIZATION—SETTLEMENT RIGHT.

DRISCOLL ET AL. *v.* DOHERTY ET AL.

An affidavit made to supply certain alleged omissions of matter from the record, which should appear therein, if it exists in fact, will not be stricken from the files, on motion therefor, if the facts, as alleged in said affidavit are not denied. Distance from the local office, character of the country, and season of the year, may be properly considered in determining whether a homestead preliminary affidavit may be made before a United States Court Commissioner in the county where the land lies.

A declaration of intention to become a citizen is not invalid, because made before a deputy clerk of a court of record, if such deputy was acting for, and in the name of the clerk of said court.

Notices defining the extent of a settlement claim posted on sub-divisions thereof outside of the technical quarter section on which the improvements are placed will protect such claim as against subsequent settlers.

The preferred right to enter forfeited railroad lands, accorded under section 2, act of September 29, 1890, as amended by the act of February 18, 1891, begins to run from the date when final instructions are issued authorizing applications to be made for such lands.

A declaration of intention to become a citizen filed by a settler relates back to the date of his settlement in the absence of any intervening adverse claim.

In the case of settlements on land that is treated as in reservation by the Department, when under the law it was open to settlement, the rights of claimants should be determined on the priority and good faith of their respective settlements, and their compliance with law in placing their claims of record after the land is declared open to entry by the Department.

Cases arising between different parties and involving different tracts of land should not be considered together, and so transmitted to the Department on appeal.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 23, 1897. (C. J. W.)

The following applications to make homestead entries for lands in Sec. 33, T. 49 N., R. 10 W., in Ashland land district, Wisconsin, appear to have been received by mail at the local office prior to nine o'clock A. M., November 2, 1891:

That of Gus Johnson for the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$; that of John O. Smith for the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$; that of Charles R. Hoar for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$; that of John Doherty for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$; that of William H. Smith for the SW. $\frac{1}{4}$; that of Alfred Hartley for the NW. $\frac{1}{4}$.

The application of John Doherty alleged settlement and his application was allowed the same date, and his entry, No. 2519, placed of record.

All the applications, except that of Doherty, were rejected because of conflict.

On November 3, 1891, Edmund Geary appeared in person and applied to enter the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, and the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, of the same section, township and range. This application was also rejected for conflict.

Subsequently, Gus Johnson, W. H. Smith, Alfred Hartley, Charles R. Hoar and John O. Smith filed supplemental affidavits, alleging settlement on or prior to November 2, 1891; whereupon citation issued summoning the parties to a hearing before the local officers on July 25, 1892. At the hearing Johnson's application was allowed and his entry No. 3030 placed of record upon filing the relinquishment of John Driscoll, who had applied for the same tract.

July 19, 1892, Edmund Geary was permitted to make homestead entry No. 3023, under his application.

The parties whose applications were rejected appealed to your office, and, on April 11, 1893, by letter ("H") of that date, your office held that the parties were not properly notified of the rejection of their applications and of the time of hearing, and that the local officers had no jurisdiction to act upon and adjudicate their conflicting claims, and the case was remanded for proper hearing, after notice to all parties.

In accordance with instructions, notice issued for a hearing on July 26, 1893, at which time all parties in interest appeared, in person and by attorney, and trial was duly had.

After Hartley and William H. Smith had submitted their testimony, their applications were dismissed, on motion, on account of their failure to reside upon, improve or cultivate the land applied for by them, respectively, since the date of settlement, November 2, 1891.

On December 5, 1893, the local officers rendered their decision, in which they re-affirmed their action in dismissing the applications of Hartley and William H. Smith. They also found that Geary, Hoar, John O. Smith, and Doherty made settlement on lands respectively claimed by them between midnight and nine o'clock A. M. of November 2, 1891, and that each had made valuable improvements and maintained legal residence on the land since settlement thereon. As to Geary it was found that he lived upon the land prior to November 2, 1891, and that he performed acts of settlement on the SW. $\frac{1}{4}$, and from date of settlement to that of hearing had maintained residence upon it, but that his acts of settlement only extended to lands claimed by him in said quarter; that Hoar, on November 2, 1891, settled on the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and that his settlement extended only to lands claimed by him in said quarter; that John O. Smith was residing on the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ prior to November 2, 1891, and before nine o'clock A. M. of that day made a new settlement thereon and marked the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, but

that Hoar had settled upon the NW. $\frac{1}{4}$ prior to Smith's settlement on the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; that Doherty, on November 2, 1891, settled on the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and that his settlement extended only to lands claimed by him in that quarter. It was found that each of the parties named had acted in good faith as to residence and improvements. They recommended that the entry of Gus Johnson be sustained; that the homestead entry of John Doherty, for the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, be canceled as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$; that the homestead entry of Edmund Geary for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ be canceled as to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$; that Charles R. Hoar be allowed to enter the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and John O. Smith be allowed to enter the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$.

All parties were duly notified of the decision, and Hoar, Geary and John O. Smith filed appeals.

On February 14, 1894, Doherty filed appeal out of time, giving as a reason for the delay the serious illness of his attorney.

On February 26, 1894, your office considered the several appeals, and passed upon the case. The decision of the local officers, in the rejection of the applications of Hartley and William H. Smith, was affirmed and made final. Their recommendation that Johnson's entry as to N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ remain intact was affirmed and declared final. Your office considered the appeal of Doherty with the other appeals filed, and affirmed the decision of the local officers.

From this decision John O. Smith, Geary, Hoar and Doherty appealed.

On May 23, 1896, the case came before the Department on said appeals. It was then found that the lands in question were included within the forfeiture declared by the act of September 29, 1890 (26 Stat., 496), following the rule laid down in the case of *Wisconsin Central Railroad v. Forsythe* (159 U. S., 46), and that your office and the Department had erred in treating them as in reservation for indemnity purposes on account of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railroad, Bayfield Branch, under the act of June 3, 1856. It was found that it was error to treat said lands as part of the surplus Omaha lands, and consequently error to exclude from consideration the rights of the several parties under claimed acts of settlement performed prior to November 2, 1891. The case was accordingly remanded to your office for further consideration and the adjudication of the rights of the parties under the act of September 29, 1890. (Letter press copy No. 333, p. 439.)

After the return of the record to your office, counsel representing Hoar, Geary and Smith, it seems, filed briefs, in which new questions were presented for your consideration. On December 21, 1896, your office, by letter ("H") of said date, readjudicated said case, from which

decision all parties have appealed. May 14, 1897, oral argument was heard in this case in connection with the case of Tubbs and Miles *v.* Hart.

Counsel for Geary appended to their brief an affidavit from Geary and certain exhibits, the purpose of which is to cure the omission of the local office to present the facts therein appearing as record facts. Counsel for Hoar has moved to strike said affidavit and exhibits from the files and return them to the attorneys filing them under rule 72 of practice.

Without considering their value as evidence at this time, it is apparent that they refer to matters which, under the rules, the record should show, if they exist in fact, and being alleged, further report from the local officers would be required, if they were disputed. Said motion to strike is made without denial of the facts alleged, and is overruled.

Your office ordered, in the event of your decision becoming final, that Doherty's entry be canceled as to the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ for conflict with the prior right of John O. Smith, and as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ for conflict with the prior right of Hoar; that Geary's entry be canceled as to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ for conflict with the prior right of Hoar, and that Hoar be permitted to enter the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and John O. Smith permitted to enter the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$.

As each of the parties relies to some extent upon his settlement right, it is necessary to look to his acts of settlement as disclosed by the record.

Certain objections are urged to the allowance of Smith's application, all of which were overruled by your office, and it is insisted that they should have been sustained. The first insistence is, that his name is John O. Johnson, instead of Smith. In reference to this matter, Smith stated on oath that in his native country, Sweden, it was customary for young men to adopt what name they pleased; that he adopted that of Smith in Sweden, and retained it when he came to this country. No fraud is suggested in connection with this change of name, nor does it appear that any one has been imposed upon by or suffered injury from it. Your office properly overruled this objection. The second objection is, that his application was illegal, because made before a United States Commissioner and not before the local office; and, third, that it was not made within three months from date of settlement.

These may be considered together. The affidavit accompanying Smith's application, dated October 31, 1891, is executed before a United States court commissioner, in Douglass county, wherein the land lies, and at such distance from the land office (the character of the country being considered and the season of the year) that it must be held to be valid under the act of May 26, 1890 (26 Stat., 121). It was filed November 2, 1891, and within three months from the date of Smith's settlement, August 15, 1891. Your office properly overruled these objections.

It is further urged that Smith is not qualified in the matter of citizenship. The declaration of his intention to become a citizen was made August 13, 1891, before a deputy clerk of the district court of the county of St. Louis, State of Minnesota, and it is urged that such declaration could not be made before a deputy clerk. Section 2165 of the Revised Statutes originally provided that such declarations could be made before certain courts including "a court of record of any of the States having common law jurisdiction." The act of February 1, 1876 (19 Stat., 2) directed that such declaration could be made before the clerk of any of the courts named in Section 2165.

Section 859, Statutes of Minnesota (1894), authorizes and empowers deputy clerks to "perform all the duties pertaining to the office of clerk of district courts." The declaration of intention of Smith, while actually made before a deputy clerk, shows that the deputy was acting for, and in the name of the clerk. This being true, the act of the deputy was the act of the clerk and the declaration was in contemplation of law made before the clerk.

It may be said, then, from the record, that Smith settled on the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ about August 15, 1891, and built a house and established residence thereon, and applied to make entry within three months from the date of his settlement; that at the time of settlement he marked his claim to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ by putting up a piece of board on a tree, with description of his claim on it. This was put at the southeast corner of the NW. $\frac{1}{4}$. The southwest corner of this forty was marked in same way, and notice of the same kind was put over his door and on the S. $\frac{1}{4}$ post. On November 2, 1891, these notices were up and renewed.

Hoar settled on the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, on November 2, 1891, for the first time. He does not deny knowledge of Smith's notice of his claim to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the record indicates that he must have had knowledge of it. Under the rule laid down in the case of *Sweet v. Doyle et al.* (17 L. D., 197), and again in *Smith v. Johnson et al.* (id., 454), Hoar would be bound to take notice of this claim, and Smith's right to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ would be superior to his. Hoar's delay and negligence in establishing residence for nearly nine months after settlement throw distrust upon his good faith and contrast unfavorably with Smith's continued efforts both to comply with the law as to residence and to make known the boundaries of his claim.

It is insisted that Geary has the oldest settlement of any of the parties, and that he has made good his claim to the whole tract claimed by him in two ways. He was living on the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ on November 2, 1891, and had been since some time in 1889, and in June, 1891, he had marked the corners of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, giving a description of his whole claim, and Hoar must have had notice of this claim; and, further, that by the 2d section of the act of September 29, 1890 (26 Stat., 496), as amended by the act of February 18, 1891 (26 Stat., 764), he had a preference right of entry, and for that reason, also, his claim is superior to that of Hoar.

This last contention must depend upon the period when the six months allowed settlers on these particular forfeited lands began to run. The act seems to be general in its terms, applying to all forfeited lands. As to these particular lands, it was not until November 2, 1891, that final instructions became effective authorizing applications to be received for them. (*Newell v. Hussey*, 17 L. D., 369.) It would seem, therefore, that if these instructions come within the purview of the act referred to, settlers would have six months from date they became effective within which to exercise their preference right of entry. The actual notice given by Geary's settlement and by his written description of the lands embraced in his claim and his subsequent application, filed within less than six months from the time when such application would be received, are sufficient reasons to conclude that his rights are superior to those of Hoar, unless there is some fatal defect in his claim. Counsel for Hoar insist that such defect exists in his naturalization papers. His declaration of intention to become a citizen, a certified copy of which is a part of the record, appears to have been filed in the district court of St. Louis county, Minnesota, and sworn to before S. E. Pearshey, deputy clerk, on the 11th day of April, 1891. The contention is that the forfeiture act only confers a preference right upon such settlers as were at that date citizens and qualified, and the case of *Hamilton v. Greenhoot et al.* (22 L. D., 360), is cited in support of the contention.

The principle that an alien can acquire no right to public land before declaration of intention to become a citizen is well settled; but it seems to be equally well settled that, upon filing such declaration by a settler, it will relate back to the settlement, if there is no intervening adverse claim. *Jacob H. Edens* (7 L. D., 229). If Hoar had been a settler or claimant at the date, April 11, 1891, when Geary filed his declaration, his contention would be sound, but he predicated no claim until November thereafter, nor did any one else, adverse to Geary.

The fact that the Department was treating the land in question as in reservation, when in law it was open to settlement, renders the provisions of the act of May 14, 1880 (21 Stat., 140), in reference to the time within which application to enter must be made after settlement, inapplicable as amongst settlers whose rights were predicated during the period when, under departmental instructions, applications could not be received. It would be manifestly inequitable to forfeit the rights of settlers because they did not apply to enter during the period when the land was being held as in reservation by the Department and at the instance of parties who presented no application during said period. Under such circumstances, the rights of claimants should be determined by reference to the priority and good faith of their respective settlements and their compliance with law in placing their claims of record after the land was by the Department declared open to entry.

In the case of *Hazard v. Swain* (14 L. D., 230), it was held:

That a pre-emption settler on land reserved for railroad purposes is entitled to three months from the date of the restoration of the land to the public domain within which to file declaratory statement and protect his rights as against a subsequent settler.

An entry erroneously and inadvertently allowed reserves the land from other entry until the erroneous entry is canceled, and a departmental order of withdrawal, although erroneous, should at least have as much force as an erroneous entry.

It appears that under the record, and this view of the law, Hoar's application should be rejected as to the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ on account of Geary's prior and superior right, and as to the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ on account of the prior and superior right of John O. Smith, and that Geary's entry should be held intact, and that John O. Smith be allowed to make entry for the land applied for by him, including the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$. It is so ordered.

Your office decision will stand as between Doherty and Hoar, but is modified to conform hereto.

A concise statement of the matters covered by this decision was rendered unnecessarily difficult because of the failure of your office to observe the rule of the Department, which forbids the grouping of different parties and tracts in one case. Your attention is again directed to the rule which forbids the consideration together of different cases involving more than one tract. The rule is clearly stated in the cases of *Henry St. George L. Hopkins* (10 L. D., 472), and of *Holmes C. Patrick et al.* (14 L. D., 271). Compliance with the rule has been waived in this case to avoid the delay which would have ensued by returning the record to your office without action, but the future observance of this rule in sending up cases from your office, on appeal to the Department, is required.

INDIAN LANDS—ALLOTTED LANDS—ACT OF MARCH 3, 1893.

MIAMI INDIANS.

The provision in the act of March 3, 1893, that the United States district attorney shall represent "allotted Indians" in all suits at law or in equity, can only be applicable where the United States retains and exercises control over the allotted lands, or where the individual still maintains his tribal relation and therefore remains under the care and protection of the government.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
November 23, 1897. (W. C. P.)

Under date of March 30, 1897, the Commissioner of Indian Affairs reported upon a communication in behalf of the Miami Indians of Indiana, in reference to the recovery of money paid for taxes claimed to have been unlawfully levied by the State of Indiana upon the lands of these Indians, and said report has been referred to me for an opinion.

The letter in behalf of said Indians is signed by Camillus Bundy,

and after reciting that taxes were levied and collected for a number of years, and that heretofore the matter was submitted to the Attorney-General of the United States, with request for the institution of proceedings by the United States in behalf of the Indians, which request was declined for lack of funds available for such purpose, it is said:

I write now to state that if the United States authorities will permit the necessary action in its own name on behalf of the Indians, members of the tribe are now in position to bear the necessary expenses of any litigation directed to the recovery of the sum paid as taxes, and also to employ an attorney to assist in the preparation and management of the suit, or, if desired, to take active charge thereof.

I have therefore to request from your Department, and from the Attorney-General through you, in behalf of these Indians an opinion upon the following points, namely: The right of the Miamis to recover, the proceedings necessary, and the court in which they should be instituted.

In his report the Commissioner of Indian Affairs recites quite fully the various treaties between the United States and these Indians under which the title by which they hold their lands and their present relationship to the government are to be determined, and he also refers to the various decisions of the State courts having relation to these questions. After expressing the opinion that taxes have been unlawfully collected from these people, he says:

But the first question to be determined now, and one upon which I ask to be advised by the Department, is whether the owners of these lands should institute the necessary proceedings themselves, or whether the federal government should do so for them.

He further says that if the question were one of governmental policy only, he would assert that the condition of these people is such as to make further calls upon the paternal care of the government unwarranted, but that another question is brought in by reason of a provision in the act of March 3, 1893 (27 Stat., 631), which reads as follows:

In all States and Territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity.

These Indians hold title to their respective lands by virtue of several treaties made long before the system of dividing lands per capita among the Indians had crystallized in the act of February 8, 1887 (24 Stat., 388), commonly designated as the general allotment act.

By the treaty of October 6, 1818 (7 Stat., 189), the Miami Indians ceded to the United States a large tract of country, and by article 3 thereof the United States agreed "to grant by patent in fee simple" to Jean Bapt. Richardville, principal chief, various tracts, and further agreed to grant to each of several other persons named, and their heirs, certain tracts. Article 6 of said treaty reads as follows:

The several tracts of land which, by the third article of this treaty, the United States have engaged to grant to the persons therein mentioned, except the tracts to be granted to Jean Bapt. Richardville, shall never be transferred by the said persons or their heirs, without the approbation of the President of the United States.

By the treaty of October 23, 1826 (7 Stat., 300), these Indians ceded to the United States all their lands in Indiana north and west of the Wabash and Miami rivers. It was provided that certain small reservations should be made, and grants were made to individuals by article 3, which reads as follows:

There shall be granted to each of the persons named in the schedule hereunto annexed, and to their heirs, the tracts of land therein designated; but the land so granted shall never be conveyed without the consent of the President of the United States.

By the treaty of October 23, 1834, as amended by the United States Senate and accepted by the Indians November 10, 1837 (7 Stat., 463), certain lands, being parts of reservations theretofore made for these Indians, were ceded to the United States, and it was agreed that from the cession thus made there should "be granted to each of the persons named in the schedule hereunto annexed, and to their heirs and assigns, by patent from the President of the United States, the lands therein named." It was further agreed that a patent in fee simple should issue to John B. Richardville for a reserve of ten sections at the Forks of the Wabash, made by the treaty of October 23, 1826, and also that patents in fee simple should issue to various other persons named for tracts granted them by former treaties.

By the treaty of November 6, 1838 (7 Stat., 569), other land was ceded to the United States, from which cession there was reserved for the band of Ma-to sin-ia a tract described by metes and bounds, and supposed to contain ten square miles. It was agreed that the United States patent to Beaver five sections of land, and to Chapine one section of land, reserved to them respectively by the treaty of 1826, and further by article 12 as follows:

The United States agree to grant by patent to each of the Miami named in the schedule hereunto annexed, the tracts of land therein respectively designated.

In this treaty the removal of the Miami tribe to the west of the Mississippi River was first mentioned, and provision was made for the expenses of a deputation of said Indians to explore the country to be assigned to them.

By the treaty of November 28, 1840 (7 Stat., 582), the Miami Indians ceded to the United States a tract of land described as "being all their remaining lands in Indiana," it being stipulated that there should be granted and reserved to John B. Richardville, principal chief, seven sections from the land therein ceded, to be conveyed to him by patent from the United States, and also in like manner one section to Francis Lafountain. It was further agreed that the United States should convey by patent to Me-shing-go-me-sia, son of Ma-to-sin-ia, the tract of land reserved by the treaty of November 6, 1838, to the band of Ma-to-sin-ia, to be held in trust by said Me shing-go me-sia for his band, the proceeds thereof, when alienated, to be equally distributed to said band under the direction of the President. It was also provided that the

Miami tribe should remove to the country assigned to them west of the Mississippi river within five years. It had been stipulated in the treaty of November 6, 1838, that John B. Richardville and family should remain in Indiana when the tribe should emigrate to the country assigned to them in the west, and the same provision was extended to Me shing-go-me-sia, and to his brothers, by said treaty of 1840.

The Miamis removed to the west in 1846, and a further treaty was negotiated with them in 1854 (10 Stat., 1093). This treaty related particularly to the cession of a part of the western reservation and the division of the residue, but the distribution of funds arising under former treaties was also provided for. In this latter provision those of the tribe remaining in Indiana and designated as the "Miami Indians of Indiana" were interested, and were represented at the negotiations by their own delegates.

By the act approved June 1, 1872 (17 Stat., 213), the Secretary of the Interior was authorized and directed to cause partition to be made of the tract reserved for the band of Me shing-go-me-sia by the treaty of 1840, per capita, share and share alike in value, to the survivors of said band and their descendants. It was further provided that patents should be issued conveying in fee to each the tract set apart to him, that the lands should not be subject to levy, sale, forfeiture or mortgage, nor to lease for longer than three years at one time, prior to January 1, 1881, that they should not be disposed of, contracted or sold by the owners prior to said date, and that the members of said band and their descendants should become citizens of the United States on January 1, 1881.

It will be noticed that after the treaty of 1826 no inhibition against alienation was provided in connection with the specific grants, except in the case of that for the band of Ma-to-sin-ia, and that was removed by the act of June 1, 1872, *supra*. The tendency was to restrict the inhibition and to confer upon the grantees a title in fee, without condition as to alienation; that is, to invest them with unconditional, individual ownership. While the fact that an Indian may hold land as an individual and without restriction as to alienation does not determine the liability of such land to taxation, nor the status of such Indian in relation to the government, yet it is a fact to be taken into consideration in determining his status.

The act of Congress of March 3, 1893 (27 Stat., 612-631), under which the question now presented arises, provides as follows:

In all States and Territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity.

The status of the Indian as to citizenship does not of itself determine whether he comes within the provision of this enactment, because Indians to whom allotments have been made are citizens of the United States. The act of February 8, 1887 (24 Stat., 388), after authorizing

the allotment of land in severalty in the discretion of the President, provides as follows:

and every Indian born within the territorial limits of the United States, to whom allotments shall have been made under the provisions of this act, or under any other law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges and immunities of such citizens, whether such Indian has been or not by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States, without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The provision of the act of March 3, 1893, quoted hereinbefore, is found in a paragraph appropriating money to enable the Secretary of the Interior, in his discretion,

to pay the legal costs incurred by Indians in contests initiated by or against them, to any entry, filing or other claims, under the laws of Congress relating to public lands, for any sufficient cause affecting the legality or validity of the entry, filing or claim.

It might be argued from the connection in which the provision is found that it was intended that the Indian should be represented in only such actions as arise under the laws relating to the public lands; but this would be a narrow, if not a strained, construction of the language used. The language is broad and comprehensive enough to include all actions to which an Indian coming within its terms is a party, and under the rule that laws relating to the Indians are to be liberally construed in their favor, this provision should be held to include all such actions.

There are no Indian reservations in the State of Indiana, and hence if these Indians are to be treated as entitled to the services of the United States District Attorney, it must be because they come under the head of "allotted Indians." While an Indian who has received an allotment of land might ever afterwards be properly described as an "allotted Indian," yet it will not be said that it was intended that he should still enjoy this special privilege after the relationship of ward and guardian between him and the United States had in all other particulars ceased. It was not intended to create a favored class of citizens, but only to afford the Indian due protection during the period in which the United States continued to exercise control over the land as trustee, or over his person as guardian. When both these relationships cease, all obligations on the part of the government to the Indian, except such as are enjoyed by all other citizens, are cancelled. It will not be concluded that Congress intended to continue this protection to the Indian after the reason for exercising it had ceased.

An allotted Indian is one who has received as his individual property a certain specified tract of land. To bring him within the purview of the law in question it must, however, appear either that the United

States still retains and exercises control over said land, or that the individual still maintains his tribal relations, and therefore remains under the care and protection of the United States.

In the treaty of 1854 those of the tribe remaining in Indiana were described as the Miamis of Indiana, and they continued to be so recognized as an organization or body in the various acts appropriating money to meet the obligations arising under treaties with the Indians until 1881. By the act of March 3, 1881 (21 Stat., 414-433), an appropriation was made to pay "the Miami Indians of Indiana" the sum that became due them under the said treaty of 1854. The Secretary of the Interior was directed to make a census of those Miami Indians entitled to participate in the distribution of this money, and it was provided that the receipt of the sum paid under that act should be a final discharge by each party so receiving of all claims whatsoever under said treaty against the government. This enactment seems to be the last legislative recognition of these people as an organization, and the Commissioner of Indian Affairs states that since the payment of this money the executive departments have not known or recognized the Miamis of Indiana in a tribal or other capacity.

It is clear from the foregoing that the former members of Me-shing-go-me-sia's band are no longer Indians, as contra-distinguished from citizens of the United States; that they hold their lands entirely free from all conditions and from the control of the United States. It follows, therefore that these persons do not come within the class of "allotted Indians," as that phrase is used in the law under consideration.

Of the other Miami Indians of Indiana, a considerable number hold their lands entirely free of conditions, and if they were ever allotted Indians in any sense, they became citizens of the United States under the provisions of the act of 1887, *supra*. They are now in the same condition as one who has received an allotment under said allotment act would be if the trust period had expired and a patent in fee had been issued to him. It follows that they cannot now be considered allotted Indians under the law in question.

The others of these people, and they must be comparatively few in number, hold their lands under grants made in the treaty of 1818, or that of 1826, with the condition that they may not be alienated without the consent of the President of the United States. I am informed at the Indian Office that the use of these lands has been entirely free from control by this Department. As to what proportion of these lands may have been alienated by approved conveyances, I have no information. The facts, so far as now presented, are that these people have used their lands free of control by the United States for seventy years or over; that they have had no executive recognition in a tribal capacity since 1881, and that if they were ever allotted Indians, they became citizens of the United States in 1887. It does not seem that they can be held to be within the purview of the act under consideration.

I have not discussed the question as to when, if ever, the lands of these people became subject to taxation by the State, nor is it intended that anything said herein shall be taken as referring to that question, nor to their right to recover anything from the State.

Approved, November 23, 1897.

C. N. BLISS, *Secretary*.

STATE SELECTION—ACT OF MARCH 3, 1879.

STATE OF MINNESOTA *v.* LENG ET AL.

The act of March 3, 1879, providing that "There be, and hereby are granted to the State of Minnesota, to be selected by the governor of the State, twenty-four sections of land out of any public lands of the United States not otherwise appropriated," with the proviso that the lands so granted shall be selected within three years, is a present grant, and the requirement as to selection, contained in the proviso, should be construed as directory and not mandatory, hence a failure of the State to make such selections within the time specified will not defeat its right under said grant.

An application to make timber land entry of lands embraced within an existing State selection confers no right upon the applicant.

Secretary Bliss to the Commissioner of the General Land Office, November (W. V. D.) 26, 1897. (C. J. W.)

On January 11, 1896, the State of Minnesota, by its duly authorized agent, presented to the local land officers at Duluth, Minnesota, a descriptive list of lands which it proposed to select in pursuance of the act of Congress of March 3, 1879 (20 Stat., 352). A description of the land embraced in said list is given in your office letter "G" of July 15, 1896, as follows: lots 1, 2 and 3 of Sec. 1; lots 2 and 3 of Sec. 2; lot 1 of Sec. 3; lots 1, 2, 3 and 4 of Sec. 7; lot 3 and the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 13; lot 4, the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of Sec. 18; lots 1, 2, 3 and 4 of Sec. 19; the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and lots 1, 2, and 3 of Sec. 20; the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 22:

Lot 1 of Sec. 23, lot 2, 3, 4, 9, 10, 11 and 12, of Sec. 24; lots 1, 2 and 3 of Sec. 25, lot 2 of Sec. 26; lots 1, 2, 3, 4, 6 and 7 of Sec. 27; lots 1, 2, 4, 6, 7 and 8 of Sec. 28, lots 1, 2 and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 30; lots 3, 4 and the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 34, all in T. 63 N., R. 16 W.

Lots 1 and 11 of Sec. 6, T. 55 N., R. 21 W. The NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and lots 5 and 6 of Sec. 1; the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and lots 3, 4, 5, 6, 7, 8, 9, 10 and 11 of Sec. 2; the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 13; the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 20; the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 28, all in T. 61 N., R. 14 W.

By said letter your office rejected the entire list, basing the objection, so far as applicable, upon the intervening rights of applicants to purchase, and where no conflicting claim appeared, basing it upon the

ground that under said act of March 3, 1879, the State was required to make selection of the lands granted within three years, whether any other claimant interposed or not. The State appealed from said decision, and notified the following named applicants to purchase, and claimants, in whose favor your office decided, of its appeal, to wit,—John Leng, John Caldwell, Daniel D. McDonald, James Foley, Clyde F. Green, Katie Zikmend, Frank Olson, John C. Green, Andrew Bloomer, Edward J. McLaughlin, William Getty, Frank Stimson, John E. Davis, Frank Cutting, Henry S. Patterson, Lucius D. Routt, Charlotte Bridgeman, Edward E. Pinkman, Sadie Buck, Magliore Beaudoin, Stephen B. Hill, Ella Miller, and Celia Pinkman.

The following assignment of errors is made—

1st. He erred in rejecting the selections on the ground that they were not made within the three years required in said act of Congress of March 3, 1879 (20 Stat., 352).

2nd. He erred in rejecting the selection of such tracts as are in conflict with applications under the act of June 3, 1878, (20 Stat., 89) for the reasons hereinafter severally assigned.

3rd. He erred in rejecting the selection of such tracts as are in conflict with applications to enter under the homestead law, for reasons hereinafter severally assigned.

4th. He erred in disregarding the relinquishment of the State of Minnesota for all of said lands filed in the U. S. Land Office, Duluth, on said January 11, 1896, prior to the filing of said selection list now rejected.

5th. He erred in entering a cancellation of the University selections, pursuant to letter (K) of February 12, 1894, prior to the expiration of time for appeal.

6th. He erred in cancelling said selections by letter (K) of April 3, 1896, to register and receiver, U. S. Land Office, Duluth, Minn.

7th. He erred in holding for allowance the applications under both the act of June 3, 1878, and the homestead law, for the reason that each and every of said applications had been rejected in 1893 for conflict with the State University selections then intact and in good standing on the records of the U. S. Land Office at Duluth, and in the General Land Office at Washington.

8th. He erred in holding for allowance either of said applications for the reason that the said applications were invalid as against the University selections when filed in 1893, and were properly rejected, and for the further reason that there is no provision of law under which a rejected application can be "resworn", and be given the validity of a new application.

9th. He erred in not rejecting each and every application under the act of June 3, 1878, for the reason that said lands so applied for had been selected for educational purposes, and thereby excepted in express terms from the operation of the act of June 3, 1878.

10th. He erred in not rejecting the application of said Celia Pinkman upon the further ground that if her application as resworn to is valid, it is invalid because the affidavit of separate use and benefit was not resworn to.

11th. He erred in not rejecting said applications under act of June 3, 1878, upon the further ground that the official surveys of said lands and the homestead entries allowed and passed to patent for adjoining lands, as shown by the records of the General Land Office, show said lands to be tillable lands, and not subject to the provisions of said act of June 3, 1878.

12th. The Hon. Commissioner erred in each and every finding of fact and conclusion of law by which he rejected the selections of said State.

The first assignment of error, if not well taken, would render the consideration of the others unnecessary; since if the State has no right to the land, it cannot have its selection list approved.

In support of the contention that your office erred in giving to the proviso to the act of March 3, 1879, a construction which treats it as a mandatory provision, is cited the ruling of the Department in the case of the State of Colorado (10 L. D., 222), where a somewhat similar provision was held to be simply directory. The principle decided in that case was adhered to in the recent case of the State of Oregon *et al v. Jones*, (24 L. D., 116).

It would seem therefore, that on this point your office must be reversed, the Colorado case overruled, or the present case distinguished from it.

Much more depends upon the question now presented, however, than the mere adherence to or overruling of the Colorado case.

It would seem that your office construed the act of March 3, 1879, to be a conditional grant and not one *in presenti*. The act is as follows:

That there be, and hereby are, granted to the State of Minnesota, to be selected by the governor of said State, twenty-four sections of land, out of any public lands of the United States not otherwise appropriated, in lieu and instead of twenty-four sections of the land granted to said State of Minnesota by the fourth subdivision of section five of an act entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and State government preparatory to their admission in the Union on an equal footing with the original States", approved February twenty-sixth, eighteen hundred and fifty-seven, and selected by said State, but which were subsequently otherwise disposed of by the United States, and to which the United States cannot take title to the State of Minnesota: *Provided*, That the lands herein granted shall be selected within three years, and from unoccupied lands of the United States lying within the State of Minnesota.

The enacting words, and those of a similar import, have, in a long line of decisions, both by the courts and the Department, been held to signify a present grant.

In the case of *Wright v. Roseberry* (121 U.S., 488), in construing the swamp land grant of September 28, 1850 (9 Stat., 519), the court held the grant to be

one *in presenti*, passing title to the lands of the character therein described from its date, and requiring only identification thereof to render such title perfect.

The clause of the act containing the words of grant is as follows:

That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands made unfit thereby for cultivation, which shall remain unsold at the passage of this act, *shall be, and the same are hereby granted, to said State.*

which words are in substance and import identical with those of the act under consideration. In support of its construction and reasoning the court refers with approval to the case of *Leavenworth, Lawrence and Galveston R. R. Co. v. United States* (92 U.S., 733), in which the court, in construing the words of grant, said:

It creates an immediate interest, and does not indicate a purpose to give in future. "There be, and is hereby granted," are words of absolute donation, and import a grant *in presenti*.

The same question was presented in the case of *Rutherford v. Green's heirs* (2 Wheat., 196).

The 10th section of an act of the North Carolina legislature, passed in 1782; enacted:

That twenty-five thousand acres of land shall be allotted for and given to Major General Nathaniel Greene, his heirs and assigns, within the bounds of the lands reserved for the use of the army, to be laid off by the aforesaid commissioners, as a mark of the high sense this state entertains of the extraordinary services of that brave and gallant officer.

The court in construing this section says:

On the part of the appellant it is contended that these words give nothing. They are in the future, not in the present tense; and indicate an intention to give in future, but create no present obligation on the State, nor present interest in General Greene.

The court thinks differently. The words are words of absolute donation, not indeed of any specific land, but of twenty-five thousand acres in the territory set apart for the officers and soldiers.

The rule of construction indicated in this case has been followed by the court in an unbroken line of decisions, and to adopt a different rule would be to cloud the title to millions of acres of public lands patented under land grants, which have been uniformly held to take effect as of the date of the granting act, although the lands were not identified until later periods. In the construction and interpretation of acts of Congress, it is the duty of the Department to follow the supreme court, where it has indicated clearly what the rule is, and in the light of its rulings it would appear that the act of March 3, 1879, is a grant in presenti to the State of Minnesota of twenty-four sections of public lands in said State not otherwise appropriated.

Your office in general terms rejects the State's list of selections, on the ground that on the 11th of January, 1896, the selection was not authorized by said act of March 3, 1879, which required that the selection of the lands thereby granted should be made within three years from the date of its approval. It is not indicated whether this conclusion was reached by treating the grant as one upon condition precedent, or as a grant providing for a forfeiture upon failure to comply with a condition subsequent.

A condition precedent is one which must happen before either party becomes bound by the contract. Whether a qualification, restriction or stipulation is a condition precedent or subsequent depends upon the intention of the parties as gathered from the whole instrument. A condition precedent must be literally observed; a condition subsequent, tending as it does to destroy the estate, is not favored and is construed strictly. *Anderson's Law Dictionary* (222).

Can there be any such thing as a grant *in presenti* upon a condition precedent? It would seem that these were irreconcilable terms, and

that a grant *in presenti*, once made, is not defeated by the subsequent addition of words of restriction or condition. Such words of restriction or condition following words indicating a present grant might require the granting clause to be construed to be a grant upon condition subsequent, but in such cases the Executive Department has no power to declare the forfeiture.

In the case of *Schulenberg et al. v. Harriman* (21 Wall., 44), it was held that:

No one can take advantage of the non-performance of a condition subsequent annexed to an estate in fee, but the grantor or his heirs or successors, and if they do not see fit to assert their right to enforce a forfeiture on that ground, the title remains unimpaired in the grantee. The rule equally obtains where the grant upon condition proceeds from the government.

It was further held, in reference to the right of the grantor for breach of the condition, that if the grant was a public one, the right could only be asserted by judicial proceedings authorized by law or some legislative assertion of the ownership of the property.

Unless authority can be found in the granting act itself to declare a forfeiture under it, it would seem that none exists. It is to be observed that the grant is not to the governor of Minnesota, but to the State for the benefit of all its people. In the absence of terms which clearly import an intention upon the part of Congress to do so, the people of the State ought not to be deprived of the benefits of the act because of the default or negligence of one of its public officers. This would be the effect if the terms of the proviso to the act, wherein it is "provided that the lands herein granted shall be selected within three years," are to be construed as mandatory. If Congress had intended that they should have the effect of working a forfeiture, it would have been easy to say so, and it is because of the absence of words indicating such an intention that I am confirmed in the opinion that the proviso should be treated as directory.

Endlich on the Interpretation of Statutes, section 433, states:

Where powers or rights are granted with a direction that certain regulations or formalities shall be complied with, it seems neither unjust nor inconvenient to exact a vigorous observance of them as essential to the acquisition of the right or authority conferred, and it is therefore probable that such was the intention of the legislature. But where a public duty is imposed and the statute requires that it shall be performed in a certain manner, or within a certain time, or under other specified conditions, such prescriptions may well be regarded as intended to be directory only, when injustice or inconvenience to others who have no control over those exercising the duty would result, if such requirements were essential and imperative.

The first paragraph seems to be applicable where the person directed is the beneficiary of the powers or rights granted, and is alone to be affected by the observance or non-observance of the directions. The last clause applies where the person directed acts in a public capacity, and upon a matter in which the public has an interest, and not himself alone. The forfeiture of the personal interest of the governor of Min-

nesota, because of his failure to act as directed, might be justified under the first clause of the section quoted, if such interest could be ascertained and separated from that of all the other people of the State; but, as the grant is to the State and not divisible, the other people in it would suffer from his default, if the direction as to the time within which he was required to make the selections was treated as imperative. But this would seem to be the very sort of a case which calls for and demands the other construction.

It is recited in the act under consideration that the grant made is in lieu of twenty-four sections of land previously granted to the State, and which had been selected by the State, but subsequently otherwise disposed of by the United States, and to which it could not for that reason make title. The act contains an admission that the State had already been granted a certain quantity of land, the title to which had not attached to the specific lands selected by it, because the government had subsequently made other disposition of it. This amounts to the recognition of a present existing right in the State to a certain quantity of land, which is inconsistent with the intention to subject that right to a condition which might destroy it. Under such circumstances, the proviso, it seems to me, should not be construed so as to make of it a condition to the right itself, but rather as a direction intended to speed the satisfaction of that right. Viewed in the light of a condition subsequent which might work a forfeiture of the grant already made, under the authorities cited, and in the absence of legislative action looking to such forfeiture, the proviso does not justify the rejection of the State's claim.

Your office reports a list of applications to purchase under the act of June 3, 1878 (20 Stat., 89), on account of which the State's list of selections is rejected, upon the ground of conflict with said applications.

The State in its second assignment of error insists that conflicting claims could not arise under the act of June 3, 1878.

This act is known as the timber land act, and as originally passed applied only to the States of California, Oregon and Nevada, and the Territory of Washington. On August 4, 1892 (27 Stat., 348), it was amended, and was made applicable to all the public land states. The applications referred to were all made after the passage of the amendatory act, and the contention of the State in its second ground would not be tenable, but for the fact that all of said applications were made while the State's original selection of the lands was of record and uncanceled. The State had on May 11, 1893, selected these lands under the act of July 8, 1870 (16 Stat., 196), which selection it relinquished on January 11, 1896, before making the selection under the act of March 3, 1879. The selection by the State of said lands as university lands was the equivalent of entry for that purpose, and had the effect of segregating the lands selected until the final cancellation of the list or its relinquishment by the State. Applications filed before its relinquishment conferred no rights on the applicants.

The principle decided in the case of *Cowles v. Huff et al.* (24 L. D., 81), wherein it was held that:

An application to enter should not be received during the time allowed for appeal from a judgment cancelling a prior entry of the land applied for; nor the land so involved held subject to entry or application to enter until the rights of the entryman have been finally determined,

is applicable in this case, and must control it.

The State's selection, under the act of March 3, 1879, made before any other application for the land, after it became subject to entry is valid, and had the effect of again segregating the lands described in the list filed January 11, 1896.

Your office calls attention in the letter of transmittal to the fact that the records of the office show that the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 13 and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 20, T. 61 N., R. 14 W., are embraced in the subsisting selection made by the State June 8, 1883, under the swamp land laws; also that the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ Sec. 28, T. 61 N., R. 14 W., are covered by commuted cash entry No. 7756, made July 10, 1885, and patented October 3, 1888.

The list of selections filed by the State is returned to your office, in order that the lands last named may be eliminated therefrom, and a clear list presented for approval.

Your office decision is modified to conform hereto.

PRACTICE—EVIDENCE—DEPOSITION—REHEARING.

BRUNER v. MITCHELL.

Objections to the alleged want of regularity in the proceedings before the local office come too late for consideration when raised for the first time on appeal to the Department.

Where the record recites the fact that the witnesses were duly sworn, and the testimony taken is signed by each of the witnesses, the absence of the officer's signature to the jurats is not ground for a new trial.

On the issuance of a commission to take depositions both of the local officers should sign the same, but the absence of the signature of one of said officers from such commission will not defeat the consideration of the testimony taken thereunder, where no objection to its admission is made at the proper time.

A rehearing will not be granted on the ground of alleged newly discovered evidence where such evidence is cumulative and intended to contradict or impeach the witnesses of the adverse party.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 27, 1897. (C. J. G.)

Benjamin H. Bruner has appealed from your office decision of February 11, 1896, dismissing his contest against the homestead entry of R. E. Mitchell for the SE. $\frac{1}{4}$ of Sec. 3, T. 28 N., R. 3 E., Perry land district, Oklahoma.

The facts in this case are sufficiently stated in your said office decision. The said contest presented the sole issue of prior settlement,

upon which question of fact the concurrent decisions of the local office and your office are in favor of the defendant. An examination of the record fails to disclose any sufficient reason for a different judgment by this Department.

Accompanying the appeal, however, is a petition for rehearing filed by the plaintiff, on the grounds of irregularity in the proceedings of the trial, among others that the witnesses were not sworn; in the issuance of commissions to take depositions, in that the said commissions were not signed by both register and receiver; in the execution of said commissions; and newly discovered evidence.

The Department does not deem it necessary to consider at length the plaintiff's allegations of irregularity, for the reason that, as the case was decided by your office and the local office on its merits, objections of this character come too late when raised for the first time on appeal. The plaintiff with counsel appeared at the hearing, offered testimony and conducted the examination of witnesses, but at that time offered no objection to the proceedings. Besides, there is intrinsic evidence that the testimony in this case was properly sworn to. The record states that each of the witnesses was sworn, but the jurats are not formally authenticated by the signature of the register or receiver. Each witness, however, signed his testimony. The presumption is that an officer has correctly performed his duty. According to the authorities when a record states that a person took the oath it will be presumed that the oath prescribed by law was taken and if there is no certificate to that effect the fact may be proved by extrinsic evidence that an oath was taken. But such inadvertence is not ground for new trial.

The objection that the commission issued to take depositions was signed only by the register would appear to be more technical than substantial, especially in view of the fact that the said depositions were apparently regularly taken in accordance with said commission and no objection was offered to their admission at the proper time. It has not infrequently happened that the receiver failed to join with the register in the report or opinion in a case, as prescribed by the Rules of Practice, and yet it has been held that such failure does not deprive your office or this Department of authority to consider the case. *Arnold v. Hildreth* (6 L. D., 779) and *Knight v. Deaver* (20 L. D., 387). While it would be better practice for both officers to sign jointly, and the Rules of Practice should be observed in this respect, yet "a rule of the Department may always be waived in the interest of substantial justice, as rules are made to facilitate rather than to embarrass and defeat it." *Caledonia Mining Company v. Rowen* (2 L. D., 719). The depositions in this case appear to have been fairly taken and are presumed to correctly reflect the facts as given by the witnesses. It does not clearly appear how the plaintiff's rights have been affected by these alleged irregularities, nor why he could not have taken advantage of them before this time.

In regard to the allegation of newly discovered evidence as the basis of a new hearing, an examination of the plaintiff's affidavits shows, aside from the question as to whether due diligence has been exercised, that the alleged evidence is not of such controlling character as to affect the decisions already rendered. The said evidence is, principally, but cumulative of that now in the record and seems to be directed more especially to a contradiction or impeachment of the defendant's witnesses. It is well settled that a re-hearing will not be granted on such grounds.

For the above reasons among others, and in view of the evidence that substantial justice has already been done, the Department is justified in denying the petitioner's request for re-hearing.

Your office decision of February 11, 1896, is accordingly affirmed, and the petition for re-hearing denied.

RAILROAD GRANT—ADJUSTMENT—RECOVERY OF TITLE.

CHICAGO, ROCK ISLAND AND PACIFIC R. R. CO.

On the adjustment of the grant made by the act of May 15, 1856, it is not material whether the line as originally located, or the modified line as authorized by the act of June 2, 1864, is taken as the measure of the grant, as the difference between the two is but small, and the grant is largely deficient under either line.

Action looking to the recovery of title to lands erroneously certified should not be taken, where patents have issued on the claims held to have excepted such lands from the grant; the parties in such a case may be left to assert their rights in the courts.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 30, 1897. (F. W. C.)

With your office letter "F" of June 8, 1894, was submitted an adjustment of the grant made by the act of May 15, 1856 (11 Stat., 9), to aid in the construction of a railroad from Davenport to Council Bluffs, in the State of Iowa. This grant was by the State conferred upon the Mississippi and Missouri River Railroad Company, which company filed its map showing the definite location of its road April 1, 1857. By the act of June 2, 1864 (13 Stat., 95), said company was authorized to modify or change the location of the uncompleted portion of its road to secure a better and more expeditious line for connection with the Iowa branch of the Union Pacific railroad.

According to the adjustment as submitted, the length of the original line as located was 309 miles, while the modified line is 315 miles.

In the adjustment of the grant the old line was respected rather than the new in fixing the location of the lands granted, and in order to

remedy the defect in the company's title, the act of January 31, 1873 (17 Stat., 421), was passed, confirming to the Mississippi and Missouri River Railroad Company, the Chicago, Rock Island and Pacific Railroad Company, successor by assignment of the said Mississippi and Missouri River Railroad Company, the title to the lands theretofore approved and certified by this Department under the grant before described; and by the act of June 15, 1878 (20 Stat., 133), the Secretary of the Interior was directed to restore to settlement, under the homestead and pre-emption laws, all the vacant and unappropriated land theretofore withdrawn on account of said grant, situated more than twenty miles from the line of location filed under the provisions of the act of 1864.

According to the adjustment submitted it appears that the whole area of the modified line was taken as a basis for the adjustment of the grant, under which it appears that the grant is yet deficient 621,017.57 acres.

The difference in the length of the two lines is but six miles; so that as far as the measure of the grant is concerned, the difference is not a material one, the grant being largely deficient under either line.

Accompanying the statement of the adjustment are two lists of lands (A and B), which lands are held by your office to have been erroneously certified on account of this grant. Of the tracts covered by list A, with a few exceptions, the filings or entries, which in your opinion served to defeat the grant, have been perfected long ago and patents issued thereon; so that the certification to the company results in leaving two outstanding evidences of title, and under the decision in the *St. Louis, Iron Mountain and Southern Railroad Company* (13 L. D., 559) no further action should be taken toward the recovery of title to such lands; the parties being left to their remedies in the courts. As to the remainder of the tracts covered by list A, it does not appear that any of the persons whose claims are by your office held to be sufficient to defeat the grant are now claiming such lands; and in view of the confirmatory provisions of the act of January 31, 1873, and of the recent decision of the supreme court in the case of the *United States v. Winona and St. Peter Railroad Company* (165 U. S., 463), a suit for the recovery of title to such tracts would seem to be useless.

The lands covered by list B have been claimed at different times by the State as swamp lands, but the claim of the State, with but two exceptions, you report, has been finally dismissed. No ground appears for a suit to recover title to such land, and in my opinion no further action should be taken. The adjustment will stand approved.

Nothing further is submitted for consideration by your letter and accompanying papers, which are herewith returned for the files of your office.

INDIAN LANDS—TRUST PATENT—AMENDMENT.

FRANCOISE CHARBONEAU.

To correct a misdescription of lands in a trust patent issued for Indian lands, or under other circumstances where the best interests of the Indian require such action, the patentee may be permitted to surrender the patent, relinquish the lands covered thereby, and make a selection in lieu thereof, on due showing of a meritorious case.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 30, 1897. (H. G.)

On July 16, 1890, Francoise Charboneau made her application to have allotted to her as an Indian of the Chippewa tribe, and the head of a family, under the provisions of the fourth section of the act of Congress, approved February 8, 1887 (24 Stat., 388), the SE. $\frac{1}{4}$ of Sec. 15, in T. 161 N., R. 71, in the land office at Devil's Lake, Dakota, now North Dakota.

The allotment was approved May 11, 1893, and the conditional or trust patent was issued thereon August 7, 1893.

On August 16, 1895, the local land office transmitted to your office the verified application of said Francoise Charboneau to amend her allotment (No. 2) to embrace the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 15, and the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 14, in T. 161 N., R. 71, and the register of the local office recommended that the application be granted.

September 9, 1895, your office referred the application to the Commissioner of Indian Affairs, who, on October 16, 1895, in his communication of that date to your office, suggested that the Indian applicant relinquish the lands described in her patent issued August 7, 1893, covered by her allotment application, and forward the same to the Office of Indian Affairs through your office, and further that

she should also furnish an affidavit by at least two disinterested witnesses having personal knowledge of the facts set forth in her said application to amend.

Your office adopted this suggestion, and on October 28, 1895, notified the local office that

before the amendment can be considered, it will be necessary that the party furnish affidavits of two witnesses corroborating from their own knowledge the statements made in her affidavit asking amendment.

It was also required by your office that the applicant should furnish a relinquishment of the lands described in her patent and should surrender the patent. Sixty days were allowed for compliance with these requirements.

February 21, 1896, the register of the local office reported to your office that said applicant was advised of the action taken by your office, and allowed sixty days within which to comply with its direction, but had failed so to do. Enclosed with this communication is the return registry receipt.

On June 12, 1896, your office by letter to the local office, after reciting the various steps taken in the proceedings, denied the application to amend the allotment.

By letter of July 8, 1896, addressed to this Department, the applicant and one Antoine Charboneau jointly complain of the action of your office, and upon reference of this letter to your office, the same was treated as an appeal from your office decision, and the matter was forwarded to the Department for determination.

The applicant appears to be an illiterate Indian and all the papers in the case requisite to be subscribed by her are signed with her mark, except the appeal, which is probably written and signed by another. At times, her name is written as "Francois," the masculine form of the name, and at times "Francoise," the feminine form, and these different names, of French origin, are interchangeably used in the application for the allotment, in the application to amend the same, and in the correspondence between your office and the local office. The registry return receipt which is the sole proof of the notification of the requirement of your office, is addressed to "Francois" Charboneau, and purports to be signed by that person, who may not have been the applicant, Francoise Charboneau, as all documents have been signed with her mark, except the appeal from your office decision, which is in another hand writing than the signature to the return registry receipt of the letter requiring her to furnish additional proof. From the letter, which is considered as an appeal from the decision of your office, it appears that the allottee did not have notice of the decision of your office requiring her to furnish proof corroborative of her application to amend her allotment and to also surrender and relinquish her patent, but did receive notice of the decision of your office, thereafter made, denying her right to amend and informing her of her right to appeal to this Department within sixty days.

The application to amend the allotment shows that the applicant has made valuable improvements on the land she desires to include in the new conditional or trust patent, in lieu of other lands which are embraced in the present allotment, which must be relinquished, and it appears from the records of the local office that the lands sought to be included are vacant.

There are no regulations governing the matter of amendments of allotments or correction of misdescription of lands in initial or trust patents, except those provided for by statutes (Act of January 26, 1895, 28 Stat., 641; and act of October 19, 1888, 25 Stat., 612), which authorize the Secretary of the Interior to correct and rectify a mistake in the description of the land inserted in the patent, during the time the United States may hold the title to the land in trust for the Indian allottee, and under other circumstances, if the best interests of the Indian are thereby conserved, to permit any Indian who has been allotted reservation lands under treaty or statute to surrender such patent with formal relinquishment and make a selection in lieu thereof.

It seems that your office proceeded properly in requiring corroborative proof and the surrender of the patent issued, as the application for amendment ought not to be granted on the uncorroborated showing of the allottee.

This Department is unwilling, however, under the circumstances of this case, to affirm your decision denying the right to amend. Service of notice of your office decision requiring additional proof before granting the application to amend the allotment, should affirmatively appear.

Such notice was addressed to Francois Charbonneau instead of Francoise Charboneau, and these names while having the *idem sonans* in the English language do not have such sound in the French language, from which these names were clearly derived, and the address in that language would clearly mean a male person, while the actual name of the allottee is that of a woman. Further, the signature is in different handwriting from that of the appeal and signatures thereto, and there is no evidence that the name was signed on behalf of the woman, Francoise, but on the contrary would seem to be signed by a man, Francois.

The decision of your office is therefore modified. Your office will direct the local officers to require the applicant, within sixty days from the date of notice of this decision to her, to furnish the additional corroborative proof heretofore called for by your office, and you will further direct the local office to give proper notice of this decision to the applicant, Francoise Charboneau, addressed to her at the proper post-office, with the designation of her status as defined in her application for allotment, namely, an Indian woman of the Chippewa tribe of Indians.

If such proof be furnished and if the patent now in her possession be surrendered with a proper relinquishment thereon, the amendment will be granted, if the tract desired to be included in the amended application be vacant and no adverse rights thereto have intervened.

PRACTICE—PETITION FOR RE-REVIEW.

MULLEN *v.* PORTER.

A petition for re-review that presents no new question, that does not assert the existence of newly discovered evidence, or that the former decision was secured through fraud on the part of the successful party, or otherwise, and is not filed within a reasonable time after the denial of the motion for review, does not present a case where the supervisory authority of the Secretary can be properly exercised on behalf of the petitioner.

Secretary Bliss to the Commissioner of the General Land Office, November
(W.V. D.) 30, 1897. (G. B. G.)

Daniel Porter, by his attorney, on November 9, 1897, filed what is denominated a "petition for re-review" of departmental decision of April 12, 1895, (20 L. D., 334) in the case of Enos Mullen *v.* Daniel

Porter, involving the SE $\frac{1}{4}$ of Sec. 10, T. 16 N., R. 7 W., Kingfisher, Oklahoma.

A motion for review of said decision was denied by the Department on July 6, 1895 (21 L. D., 29).

This last ruling occurred, therefore, more than two years before the present petition for re-review was filed. This petition presents no new question, does not assert the existence of any newly discovered evidence, and does not charge that the former decision was accomplished through any fraud on the part of the successful party, or otherwise; but simply reasserts the former contentions of Porter and urges that the decision of April 12, 1895, denying the same, was erroneous.

Applications for re review and applications for the exercise of the supervisory authority of the Secretary, are, in some instances, entertained after a decision of the Department has been adhered to upon motion for review. This supervisory authority can be, and when occasion exists therefor is, asserted by the Secretary upon his own motion and without any application therefor by parties in interest. The reason for this jurisdiction lies in the fact that the Secretary of the Interior is by law charged with the supervision of the public business relating to public lands and the duty so imposed terminates only when title passes from the government; but in all instances the authority should be exercised with a due regard to the rights of the parties and the public so that justice and not injustice will be promoted thereby. Where it is sought only to obtain a re examination of the same evidence, or a reconsideration of the same questions of law, the party feeling aggrieved should at least make his application for further consideration within a reasonable time. Here, the departmental decision of April 12, 1895, so adhered to on review July 6, 1895, has stood unquestioned and apparently acquiesced in for more than two years. The successful party, in the absence of any seasonable proceeding to question that decision, was justified in treating the same as finally determining his relation to the land in question, and in making valuable improvements thereon. It requires no argument or discussion to show that more than two years is not a reasonable time within which to re assail such decision, and that after remaining silent for that length of time Porter could not justly be permitted to question the rights of Mullen thereunder, in this manner.

The petition for re-review is denied, without examining or considering either the findings of fact or the conclusions of law announced in the former decision.

RAILROAD GRANT—MINERAL LANDS—CLASSIFICATION.

INSTRUCTIONS.

A final mineral return by the commissioners appointed under the act of February 26, 1895, operates to except the lands so classified from the grant to the Northern Pacific, but does not prevent such disposition of said lands as may be proper, on a subsequent showing as to their character; the classification being treated as of the same effect as a mineral return by the government surveyor.

Secretary Bliss to the Commissioner of the General Land Office, November
(W. V. D.) 30, 1897. (F. W. C.)

I am in receipt of your office letter "N" of October 9, 1897, in which you call attention to the fact that in the report for the month of November, 1896, made by the United States mineral land commissioners appointed under the act of February 26, 1895 (28 Stat., 683), the unsurveyed portion of township 65 N., R. 1 W., B. M., Cœur d'Alene land district, Idaho, was classified as mineral land, the report stating that the unsurveyed lands,

when surveyed, will constitute all of sections 24, 13 and fractional section E. $\frac{1}{2}$ of 8, all 9, 10, 11 and 12, township 65 N., R. 1 W., B. M.

The above classification was approved by this Department April 23, 1897, and was so noted upon the records.

From your office letter it appears that on August 18, 1897, Angie McLaughlin was permitted to file her Indian allotment application, No. 64, for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 8, T. 65 N., R. 1 W., B. M.

Your office letter states—

It is understood by the commissioners that the classification under the act of February 26, 1895, *supra*, is limited to the odd sections of land within the Northern Pacific Railroad Company's grant. . . .

The mineral classification of even sections should not operate to exclude the lands in such even sections from agricultural entry, but it seems proper that the office take cognizance of the fact that such lands are claimed as mineral lands, especially when, as in this case, the records of the office show a patented mining claim in said section eight.

The act of February 26, 1895, *supra*, providing for the examination and classification of the lands within the limits of the grant for the Northern Pacific Railroad Company, in the States of Montana and Idaho, was evidently designed to aid a speedy adjustment of the Northern Pacific grant. By the sixth section of the act the classification, where no protest is filed against the same, and when approved by the Secretary of the Interior, becomes final, and a tract returned as mineral, which return becomes final, is forever excepted from the grant. But it does not prevent other disposition of the land, where returned as mineral, should subsequent investigation prove the tracts to be not mineral in character, and an entryman making entry of such lands under the mineral laws should establish the mineral character the same as though such classification had not been made.

A mineral return by the commissioners would not, therefore, prevent your office from making such disposition of the land as is proper upon a subsequent showing as to its character, but the classification should be considered as of the same effect as the return of mineral lands made by the government surveyor.

The revocation of the formal approval of the lists containing the classification before referred to is not deemed necessary.

MINING CLAIMS—POSSESSION—RELOCATION.

STEWART ET AL. v. REES ET AL.

The continuity of possession under a mining claim is not disturbed by an attempted relocation made at a time when there was no statutory ground therefor.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 3, 1897. (P. J. C.)

A full history of this controversy will be found in *Stewart et al. v. Rees et al.* (21 L. D., 446), and it is not deemed necessary to recite the facts again in this opinion any further than is required to give intelligent understanding to the present question.

It appears that Rees became possessed of the Jaw Bone lode, situated in the Helena, Montana, land district, in 1875, and in 1889 made an application for patent therefor together with a mill site; the application was adverse as to the mill site, and after that litigation was disposed of Rees made entry of the mining claim, on December 10, 1892.

Subsequently *Stewart et al.* filed a protest against the entry, alleging that they were the owners of the ground by reason of the location of the Weaver lode claim.

A hearing was had, and finally the Department, by said decision, remanded the case for another hearing, for the purpose of determining whether or not Rees or his grantors had had possession of, and had been working the claim for the period prescribed by the statute of limitations of the State of Montana.

Hearing was accordingly had, and as a result thereof the local officers found that Rees and his grantors had been so possessed of, and had worked the claim, and recommended that the protest be dismissed and the claimant be allowed to secure patent for the Jaw Bone lode.

On appeal your office affirmed this action; whereupon the protestants prosecute this appeal.

From an examination of the testimony it is found that in the opinion of the local officers, and that of your office, the facts as disclosed by the evidence are fairly and sufficiently set forth, and the Department concurs in the conclusions arrived at.

It may be said, in addition to this, that it is not denied that Rees had possession and worked this claim from 1875 until 1886 without

there being any dispute about, or cloud upon, his title in any manner whatever. He was working the mine through his agent Kerwin in 1885, and quite a large amount of ore was extracted during that year.

It appears that Kerwin, not being entirely satisfied with the conditions under which he was working, relocated the claim early in 1886, but fearing his location, being made as it was while he was acting as Rees' agent, was not a lawful one, one Wisemiller also relocated the ground later in the year 1886.

According to the testimony of Kerwin himself, as given at the hearing, there was no reason whatever that would justify a relocation of this territory; the annual work had been performed for the year 1885 and there was no reason to believe that there was any intention to abandon on the part of Rees. On the contrary, it is shown by the correspondence between the parties that Rees acted entirely in ignorance of this pretended relocation and that the relation that had theretofore existed between them was still maintained.

But aside from this, in 1888 Wisemiller signed a statement, in the shape of a relinquishment of his location, in which it is stated "that said property had never been vacated, according to their best knowledge and information, since the location under title claimed by the second party." (The second party being Mr. Rees.)

It is shown by the testimony of Mr. Kerwin that at the time this relinquishment was entered into he was cognizant of the fact and consented to it, although he did not sign the paper.

An attempt to make a relocation of a mining claim as was done in this case certainly did not create in the parties making it any such adverse right as would defeat the continuity of the original claimant's possession. (*Belk v. Meagher*, 104 U. S., 279.)

Your office judgment is therefore affirmed, and if otherwise satisfactory the Jaw Bone entry will be passed to patent.

APPLICATION TO ENTER—SETTLEMENT RIGHTS.

GILES v. TROOP.

An application to amend an entry, suspended on account of a prior existing entry covering the land so applied for, confers no right upon the applicant as against a settler on the land, in the event of the cancellation of the prior entry.

During the existence of an entry no rights, adverse thereto, can be acquired to the land embraced therein either by applications to enter such land or by settlement thereon, but, on the cancellation of said entry, as between such settlers, the date of settlement may be properly considered.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 4, 1897. (J. L. McC.)

Americus W. Kees, on September 25, 1891, made homestead entry for the SE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 4 E., Oklahoma City land district, Oklahoma Territory.

John D. Troop, on September 25, 1891, made homestead entry for the NE. $\frac{1}{4}$ of Sec. 6, T. 10 N., R. 4 E., same land district.

On October 3, 1891, Kees applied to amend his entry to the NE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 4 E.

On October 5, 1891, Troop made application to amend to the SE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 4 E., alleging settlement thereon. (This was the tract which Kees had originally entered.)

Kees's application to amend brought him into conflict with one Kennedy; and action on Troop's application to amend was suspended until the contest case of Kees *v.* Kennedy should be closed.

On January 16, 1891, A. J. Giles filed in your office a protest against the allowance of Troop's application to amend.

The contest between Kees and Kennedy resulted in Kees being allowed to amend his entry by substituting the tract in controversy in that case (the NE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 4 E.), for that named in his original entry. Thereupon Troop was permitted by your office letter of August 14, 1895, to amend his entry by substituting therein the tract thus relieved from Kees's entry (the SE. $\frac{1}{4}$ of Sec. 31, T. 11 N., R. 4 E.), which is here in controversy. Troop's amendment was consummated on October 31, 1895.

Prior to the last named date, however—to wit, on September 9, 1895—Giles, having been notified of the action of your office allowing Troop to amend, filed a second protest against the allowance of such amendment (which protest afterward ripened into a contest). In said protest Giles alleged that he had resided upon and improved said land since September 9, 1892, and that Troop had never established actual residence upon the land, but had abandoned the same.

On January 13, 1896, your office advised the local officers that when your office letter of August 14, 1895, was written, allowing Troop to amend his entry, Giles's protest was overlooked; and your office directed that a hearing be had.

March 13, 1897, was set for such a hearing. On that date both parties appeared in person and by attorney.

The evidence submitted by the contestant (Giles) showed that the defendant (Troop) settled upon the land on September 22, 1891; that in a short time after filing his application to amend (October 5, 1891) he left the land, and did not return thereto again until about October 1, 1895; that the contestant moved on the land with his family September 9, 1892, and continued to live there until the date of the hearing; and that his improvements are worth about \$500.

To the above evidence the defendant demurred, alleging, in substance, that as a matter of law he was not required to reside upon the land until his application to make entry of the same had been allowed; that the contestant's evidence showed that, if any default existed, it had been cured by establishing residence on the land prior to the filing of the affidavit of contest; and that since establishing residence he has

built a substantial house, and cultivated and improved the land according to law.

The local officers rendered their joint opinion "that under the law Troop was not required to reside upon the land pending the consideration of his application to amend"; that "Giles obtained no rights under his settlement in the face of Troop's application and while the land was in contest"; and that, if it should be held that Troop was required to reside upon the land to which he desired to amend, "his laches as to abandonment were cured by his acts of settlement and cultivation prior to the order or notice of hearing in this case." Therefore they sustained the demurrer.

Giles appealed to your office, which affirmed the action of the local officers. Thereupon he appeals to the Department—contending that "the law permitting a homestead applicant to reside and maintain a residence elsewhere than on the land embraced in his homestead application" pending the consideration of the allowance of such application, "does not apply where the representations made to procure the amendment of the entry were false and fraudulent, and does not apply where the applicant claims the land as an actual settler thereon prior to making his homestead application therefor"; also—

That Troop, having a full knowledge of the settlement and improvement of the tract by Giles in 1892, and making no remonstrance to Giles against the settlement and improvement, but in silence fully acquiescing therein, and thereby leading Giles to believe, as the appearance of the land indicated, that it was abandoned and unclaimed, can not *afterward*, through the means of a fraudulent homestead application for the land, be heard to assert rights thereto as against Giles.

If the language last above quoted is intended to convey the impression that Troop's homestead application was made *after* Giles's settlement upon the land, it is not warranted by the record facts; which show (*supra*) that Troop made application for the land October 5, 1891, while Giles does not allege settlement prior to September 9, 1892.

It is contended, furthermore, that whatever right Troop may have had to the tract in controversy was necessarily, under the circumstances, based, not upon his application, but upon his alleged settlement; and that he had, subsequently to such settlement, failed to protect the same by the maintenance and continuance of residence.

There would appear to be some weight in this contention. When Troop filed his application to amend to the tract in controversy it was covered by Kees's entry; hence no right could be gained by said application. He based his right to amend on the ground that he had originally intended to enter the tract, that he had *made settlement* thereon, and was actually residing there at the date of his application. Action upon his application was suspended. Before action thereon was taken, Giles alleges, Troop had abandoned the land, and at the date of the cancellation of Kees's prior entry was not living thereon, and had not been for years. Meanwhile, Giles had settled upon the land. The

Department has held (see *Clancy et al. v. Hastings and Dakota Ry. Co.*, on review, syllabus—20 L. D., 135):

An application to enter, properly rejected, on the ground that the land is covered by the existing entry of another, and pending on appeal, *confers no right upon the applicant as against a settler upon the land*, in the event that the prior entry is subsequently canceled.

This ruling appears to cover squarely the case now under consideration.

Troop contends, however, and the local officers held, that "his laches as to abandonment were cured by his acts of settlement and cultivation prior to the order or notice of hearing in this case." But the testimony (so far as taken) indicates that Giles had settled upon the land long prior to Troop's return thereto. While the land was covered by Kees's entry, Troop could gain no right thereto by his application, nor Giles by his settlement; but when Kees's entry was canceled, then, *as between themselves*, the date of settlement by them respectively becomes a proper subject for inquiry. (*Geer v. Farrington*, 4 L. D., 410, and many cases since.)

From these considerations it is evident that the local officers and your office erred in sustaining Troop's demurrer to the testimony submitted by Giles bearing upon the matter of his settlement and residence upon the tract. It is conceded by Troop that he did not live on the land in controversy from the latter part of the year 1891, until about October 1, 1895; and it does not clearly appear that he ever actually lived thereon. In view of these circumstances, the Department is of the opinion that his entry should be held subject to Giles's right to make entry of the land, in case the latter shall apply to make such entry within a reasonable time, and it is so ordered.

The decision of your office is modified as above indicated.

This decision will be substituted for that of October 2, 1897, which was informally recalled prior to promulgation by your office, and which is hereby revoked and annulled.

RAILROAD GRANT—DEFINITE LOCATION.

FISHER *v.* STATE OF WISCONSIN ET AL.

The proclamation of the President under the act of June 18, 1878, withdrawing from sale and disposal certain lands required for reservoir purposes, did not affect the status of lands to which rights under a railroad grant had attached by definite location.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 4, 1897. (C. W. P.)

This case involves the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, or lot 3, of Sec. 33, T. 41 N., R. 1 W., Ashland land district, Wisconsin.

It is shown by the record that on March 17, 1896, your office, in the

contest case of John Fisher v. State of Wisconsin, rejected the claim of the State of Wisconsin, under the swamp-land grant of September 28, 1850, to the land covered by Fisher's homestead entry, No. 2860, viz., the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 41 N., R. 1 W., 4th P. M., all of said land being apparently involved in the contest.

When, after said rejection, the posting of the same on the records of your office was attempted, it was found that only one of the tracts, as described, viz., the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said Sec. 33, appeared of record as a swamp claim of the State, and the proper notation of rejection was made as to said tract. It appeared further that the State claimed lot 3, of said Sec. 33, as swamp land, and that said lot 3 had been listed by the Wisconsin Central Railroad Company on July 12, 1882, and that the railroad claim thereto had been held for rejection on July 18, 1889, on a *prima facie* showing of the swampy character of the land; but that no report, under said decision, had been received from the local office.

It further appears that it has since been found that lot 3 of Sec. 33 is identical with the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said listing, and the swamp claim thereto appears to have been properly rejected by your office decision of March 17, 1896. By your office decision of May 12, 1896, it was held that the action, taken by your office as the result of a hearing, in a regular contest and disposing finally of the State's swamp claim, warranted your office in revoking the decision of July 18, 1889, holding the railroad's claim to said lot 3 for rejection, and it was so ordered.

Mr. Fisher has appealed from this decision to the Department, alleging as error in said decision, (1) that the company failed to appeal from the rejection by the local officers of its application to list said lot 3, and also (2) failed to appeal from your office decision of July 18, 1889, rejecting said application to list; (3) that the land was reserved for reservoir purposes at the date the company applied to list, and having been subsequently restored, was open to homestead entry, and finally (4) that the company has (doubtlessly) secured indemnity for the land, and for that reason has failed to apply for it, or to appeal from the several rejections of its application to list said land.

Upon the first two objections to the decision of your office it is sufficient to say that there is no evidence that the company had notice of either of these rejections. The third allegation of error is not well taken. The records of your office showing that the land in controversy is within the primary limits of the grant to the company as definitely located November 10, 1869, and passed to the company by the force of the grant, if at all, listing and approval could add nothing to the company's title. *Tronnes v. St. Paul, Minneapolis and Manitoba Railway Company*, 18 L. D., 101. The act of June 18, 1878 (20 Stat., 152), and the President's proclamation of March 22, 1880, withdrawing from sale and disposal certain land in the State of Wisconsin, although in terms

embracing the land in question, could not affect said land, as the right of the company under its grant had attached by the filing of its map of definite location, and must be held to have passed thereunder. The fourth ground of objection to your office decision has nothing to support it.

For these reasons your office decision is affirmed.

HOMESTEAD ENTRY—CANCELLATION—HEIRS—CREDITORS.

PATTEN v. KATZ.

A homestead entry must be canceled where it is duly shown, after the expiration of the statutory life of the entry, that the entryman died prior to the completion of his entry, and that there are no heirs of the entryman who are entitled to perfect said claim.

Where a homesteader dies prior to the completion of his entry there is no authority for the perfection thereof for the benefit of creditors.

The right of purchase under Section 2, Act of June 15, 1880, is limited to entries made prior to the passage of said act.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 4, 1897. (G. B. G.)

I have considered the appeal of D. Buchanan, administrator of the estate of Christian Katz, deceased, and agent of the heirs of said Katz, from your office decision of September 18, 1895, affirming the decision of the local officers herein and holding for cancellation homestead entry, No. 5859, for the NW. $\frac{1}{4}$ of Sec. 34, T. 19 N., R. 34 E., Spokane land district, Washington.

It appears that the said Christian Katz made homestead entry for said land on November 15, 1887, that he died on or about October 6, 1892, and that the said D. Buchanan was appointed administrator of his estate on December 11, 1892.

On October 22, 1894, the plaintiff, Wallace E. Patten, initiated a contest against said entry, alleging the death of said Katz as aforesaid; that since his death the heirs had failed to cultivate the land; that he had no heir, who was a citizen of the United States and entitled to inherit said land, and that the entryman was not a citizen of the United States.

After due notice by publication, under the rules of practice in such cases made and provided (see rules 11, 12, 13, 14, 15 and 16), a hearing was had on January 22, 1895.

The local officers held:

That as it has been shown that Christian Katz died before earning his homestead, and that there are no heirs, or heirs entitled to inherit, and under the circumstances no person or persons who can purchase or make proof; that the said homestead entry should be canceled, and that Wallace E. Patten should be allowed the preference right of entry.

The appeal of the administrator from your office decision affirming that of the local officers brings the case to the Department, as aforesaid.

It is specified as error, substantially:

1st. That the Commissioner erred in taking for granted that the administrator and agent for the heirs admitted that there were no known heirs of Christian Katz, deceased, citizens of the United States, and in passing upon said contest without more conclusive proof, as required by law.

2d. Erred in his decision that the administrator was not entitled to the undisturbed possession of the land until the end of the seven year period.

The record shows clearly that the administrator did, to avoid a continuance, and for the purpose of trial, stipulate that

there are no known heirs of Christian Katz in the United States who are entitled to inherit from the said Christian Katz under the laws of the United States.

But this is not thought to be material. The law of notice by publication was applicable in this case, and was strictly complied with. The contest was instituted before the expiration of the seven years period, but inasmuch as the notice by publication was not given until after the expiration of that time, the contest was not premature. There is no suggestion of record, nor has there been brought to the attention of the Department since the hearing any fact that would raise a presumption that there are any heirs of Christian Katz who can under the law take this estate.

On the second question, it may be said that the administrator has had possession of this land not only seven years, but now, including the possession of the entryman, ten years, and had had possession at the date of the trial more than seven years.

The Department is keenly alive to the fact that this entryman had in good faith complied with the homestead law, and left valuable improvements on the land in controversy. It is recognized, too, that all reasonable opportunity should be given and diligence used to discover some one upon whom the fruits of his labor may be cast; but nothing is shown to warrant the government in further delaying the cancellation of his entry.

It is urged in argument that creditors should have the estate. This is prohibited by statute, and if the entry were passed to patent, the estate could not be converted to that purpose.

The further contention that the alien heirs are entitled to the right of purchase under the second section of the act of June 15, 1880 (21 Stat., 237), is without force. It relates alone to entries made prior to the passage of the act, and if it were prospective in its operation, its application to this case does not appear.

The decision appealed from is affirmed.

MILLE LAC INDIAN LANDS—HOMESTEAD.

HARVEY M. BENNETT.

A homestead entry of Mille Lac Indian lands made during the period specified in the joint resolution of December 19, 1893, is by such resolution confirmed, subject only to due compliance with the provisions of the general homestead law, and to such payments as may be required thereunder.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 4, 1897. (E. B., Jr.)

On February 7, 1891, Harvey M. Bennett made homestead entry No. 3969 (Taylor's Falls series) for the tract of land described as lots 1, 2, 3, and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 8, T. 42 N., R. 25 W., now in the St. Cloud, Minnesota, land district; and on April 1, 1896, final certificate No. 8964 was issued to him for said tract. On August 18, 1896, your office decided that Bennett must pay for the land at the rate of one dollar and twenty-five cents per acre, under the provisions of the sixth section of the act of January 14, 1889 (25 Stat., 642), and held his entry for cancellation, subject to payment as required, or to appeal, within sixty days from notice. He has duly appealed from said decision, contending that under the joint resolution of December 19, 1893 (26 Stat., 576), he is relieved from the payment required by your office.

The land in question is within what was formerly known as the Mille Lac Indian reservation. In the cases of David H. Robbins (10 L. D., 3) and Amanda J. Walters *et al.* (12 L. D., 52) the history of legislative and departmental action, concerning the lands in said reservation and other lands of the various bands of Chippewa Indians in Minnesota, is quite fully set forth, commencing with the treaty of February 22, 1855 (10 Stat., 1165). It is only necessary, however, for purposes of the present case, to consider such action affecting the Mille Lac lands as is of comparatively recent date. Provision for the disposal of these lands was made by the act of January 14, 1889, *supra*. By section six of this act the surveyed agricultural lands on said reservation, "not allotted under this act nor reserved for the future use of said Indians," were made subject to disposal—

by the United States to actual settlers only under the provisions of the homestead law: *Provided*, That each settler under and in accordance with the provisions of said homestead laws shall pay to the United States for the land so taken by him the sum of one dollar and twenty-five cents for each and every acre, in five equal annual payments, and shall be entitled to a patent therefor only at the expiration of five years from the date of entry, according to said homestead laws, and after the full payment of said one dollar and twenty-five cents per acre therefor, and due proof of occupancy for said period of five years.

That section contains also certain other provisions, but they are not pertinent to this case.

Under the decision of the Department in the case of Amanda J. Walters *et al.*, *supra*, dated January 9, 1891, and departmental letter of

January 21, 1891 (unreported), which, together, held, in effect, that the Mille Lac lands were not in a state of reservation at the date of the passage of the act of January 14, 1889, and were therefore not within its provisions and "should be disposed of as other public lands under the general laws," both pre-emption and homestead entries for these lands were allowed by the local office (then at Taylor's Falls, Minnesota,) upon the same conditions and subject to the same requirements, only, in every respect, as were contained in the general pre-emption and homestead laws, on and after the receipt by the local office, February 3, 1891, of the said departmental letter. Subsequently, however, by departmental letter of April 22, 1892 (14 L. D., 497), your office was instructed that these lands were not subject to disposal under the general laws, but under the special provisions of the act of January 14, 1889.

These instructions were duly communicated to the local officers by your office under date May 3, 1892, and at the same time homestead entries and soldier's declaratory statements made under authority of the Walters case and departmental letter of January 21, 1891, were "suspended to await the result of the examination provided for by the act of January 14, 1889." On November 10, 1892, the pre-emption entries similarly made were held for cancellation, but on December 20th following, it appearing that a joint resolution for the relief of the pre-emptors and homesteaders affected by the instructions of April 22, 1892, *supra*, was pending before Congress, the action of November 10, 1892, was revoked and the pre-emption entries, also, suspended, "to afford time for proper remedial legislation."

On December 19, 1893, the following joint resolution of Congress was approved (28 Stat., 576):

That all *bona fide* pre-emption or homestead filings or entries allowed for lands within the Mille Lac Indian reservation in the State of Minnesota between the ninth day of January, eighteen hundred and ninety-one, the date of the decision of the Secretary of the Interior holding that the lands within said reservation were subject to disposal as other public lands under the general land laws, and the date of the receipt at the district land office at Taylors Falls, in that State, of the letter from the Commissioner of the General Land Office, communicating to them the decision of the Secretary of the Interior of April twenty-second, eighteen hundred and ninety-two, in which it was definitely determined that said lands were not so subject to disposal, but could only be disposed of according to the provisions of the special act of January fourteenth, eighteen hundred and eighty-nine (twenty-five Statutes, six hundred and forty-two), be and the same are hereby, confirmed where regular in other respects, and patent shall issue to the claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a *bona fide* compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed.

Bennett's homestead entry, in view of the facts already stated, comes clearly within the provisions of the joint resolution. It seems to have been made in good faith in reliance upon the holding of the Department that the Mille Lac lands, not being in a state of reservation, were not within the provisions of the act of January 14, 1889, but were

subject to disposal under the general laws. It was made, as appears on the face of the entry papers, under sections 2289 and 2290 of the Revised Statutes, in all respects as homestead entries were regularly made under the general provisions of those sections; and Bennett apparently obtained his final certificate pursuant thereto and to the general provisions of section 2291 of the Revised Statutes.

Said joint resolution is remedial legislation and therefore to be liberally construed. So construed, it would seem to have been the intention of Congress to accept and validate to the fullest extent, for the period indicated, the then prevailing departmental determination of the status of these lands, as to "all *bona fide* pre-emption or homestead filings or entries" allowed therefor, during that period, or, in other words, to clothe with all the force of positive law, by means of legislative endorsement, for the said period, the instructions which provided for the disposal of the Mille Lac lands under the general laws, as to all such filings and entries; and also to provide therein for the perfecting of these filings and entries under the general laws irrespective of anything in the act of January 14, 1889, to the contrary. This is substantially the view already declared by the Department in the case of *Haggberg et al. v. Mahew* (24 L. D., 489) as to pre-emption filings for these lands, made during the period specified in the joint resolution. Having been allowed, or more truly, perhaps, invited, to make their filings and entries under the general laws, both pre-emptors and homesteaders, in their *bona fide* efforts thereunder to acquire homes on the public domain, were to be subject to no other requirements than those of the general laws.

The language of the resolution is too plain and positive to admit of any other reasonable construction in view of the conditions, then presumably fully known to Congress, and to which its enactment was a fitting culmination. Without even by implication subjecting these filings and entries to any of the conditions of the act of January 14, 1889, the resolution expressly declares that—

the same are hereby confirmed, where regular in other respects, and patent shall issue to the claimants for the lands embraced therein, as in other cases, on a satisfactory showing of a *bona fide* compliance on their part with the requirements of the laws under which said filings and entries were respectively allowed.

It would be wholly at variance with these plain provisions for perfecting their entries, it seems to the Department, to require of homesteaders whose entries come within the purview of this joint resolution, the payment of one dollar and twenty-five cents per acre for their lands, or to require of them any payment not required by the general law.

The decision of your office is therefore reversed, and you will pass the entry of Bennett to patent, if regular in other respects.

RAILROAD GRANT—INDEMNITY SELECTION—SPECIFICATION OF LOSS.

CHICAGO, ROCK ISLAND AND PACIFIC R. R. CO. ET AL. *v.* WAGNER.

There is no necessity for the enforcement of the rule requiring specifications of loss to accompany indemnity selections, where the grant is practically adjusted and found largely deficient, and no one is claiming adversely to the company at such time; and under such circumstances, a selection without designation of loss will be recognized, as against a homestead entry not made until after the submission of the adjustment.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 4, 1897. (F. W. C.)

An appeal has been filed in behalf of the Chicago, Rock Island and Pacific Railroad Company and Samuel Kreps, from your office decision of September 7, 1895, ordering the cancellation of the company's selection covering the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 76 N., R. 30 W., Des Moines land district, Iowa, and sustaining the action of the local officers in denying the homestead application of Samuel Kreps covering said land.

The tract in question appears to be within twenty miles of the modified line of said road as located under the provisions of section 2 of the act of June 2, 1864 (13 Stat., 95).

The grant in question was made under the provisions of the act of May 15, 1856 (11 Stat., 9), to aid in the construction of a road from Davenport to Council Bluffs, in the State of Iowa, and was a grant in place of every alternate section of land designated by odd numbers, for six sections in width, on each side of the line of the road, with provision for indemnity for losses to be selected within fifteen miles of the line of the road.

The road was definitely located April 1, 1857, by the Mississippi and Missouri River Railroad Company, upon which company the State had conferred the grant. The act of June 2, 1864 (*supra*), allows said company to modify or change the location of the uncompleted portion of its line, and by the second section of said act it was provided:

That whenever such new location shall have been established, the said railroad company shall file in the general land office at Washington a map, definitely showing such new location; and the Secretary of the Interior shall cause to be certified and conveyed to said company from time to time, as the road progresses, out of any public lands now belonging to the United States not sold, reserved, or otherwise disposed of, or to which a pre-emption claim or right of homestead settlement has not attached, and on which a *bona fide* settlement and improvement has not been made under color of title derived from the United States or from the State of Iowa, within six miles of such newly located line, an amount of land per mile equal to that originally authorized to be granted to aid in the construction of said road by the act to which this is an amendment; and if the amount of land granted by the original act to aid in the construction of said railroad shall not be found within the limit of six miles from such line, then such selections may be made along such line within twenty miles thereof: *Provided*, That the said company shall not be entitled

to, and shall not receive, any land under this grant which is situate within fifteen miles of the line of the Burlington and Missouri River Railroad, as indicated by the map of said road, now on file in the general land office.

It appears from your office decision that the company made selection of the tract in question on February 25, 1886, but through inadvertence said list was not at the time posted upon the local records; so that on December 22, 1894, John Wagner was permitted to make homestead entry of the land. Four days later, on December 26th, Samuel Kreps tendered homestead application for the land, alleging settlement on October 28, 1884, which application was rejected; from which Kreps appealed.

In an affidavit filed by Kreps he alleged that on October 28, 1884, the date of his alleged settlement, he received a contract of sale from the Chicago, Rock Island and Pacific Railroad Company, and on December 14, 1888, the said company conveyed the land to him by warranty deed.

Your office letter "H" of August 5, 1895, treated Kreps' appeal as an application for a hearing and returned all the papers for the action of the local officers.

Hearing was duly had, at which all parties were represented, and upon the record made the local officers held that Kreps gained no right by the presentation of his application when the land was covered by Wagner's entry, unless he could show that he was an actual settler at the date of Wagner's entry, which he failed to do at the hearing; further, that Wagner's entry should be canceled for conflict with the company's selection presented on February 25, 1886, being prior to the allowance of said entry.

No appeal was taken from said decision, but your office, upon reviewing the record, held that the company's selection was an inchoate one at the date of Wagner's entry, not being accompanied by a designation of a loss as the basis for the selection, and therefore no bar to the allowance of Wagner's entry.

The record made at the hearing clearly evidences that Kreps, although not actually residing upon the land in question, had the same enclosed and included within his fence, he owning the adjoining land; further, that the entire tract was in a high state of cultivation and that Wagner was fully apprised of Kreps' possession, when, on December 22, 1894, he made homestead entry of the land.

The company's selection not having been placed of record, Wagner, as before stated, with full knowledge of Kreps' claim and possession of the tract, sought to deprive him of the land in its highly improved condition.

The equities are clearly all with Kreps.

The local officers held, as before stated, that Kreps could gain nothing by his homestead application presented after Wagner had been permitted to make entry of the land; but as now disclosed, the land was not subject to Wagner's entry when allowed on December 22, 1894, because of the pending indemnity selection made in 1886.

The adjustment of this grant was submitted June 8, 1894, and therein the grant is shown to be largely deficient—over 621,000 acres being yet due on account of the grant, which adjustment has been duly approved by this Department.

A loss is required to be specified as the basis for an indemnity selection, where the matter is one between the United States and the company, only for the purpose of preventing an excess in approvals in the satisfaction of the grant.

Prior to the allowance of Wagner's entry this grant had been practically adjusted, but a few selections remaining undisposed of, and the balance sheet prepared under the act of March 3, 1887 (24 Stat., 556), clearly evidenced a large deficiency in the grant. No one was then claiming a right to this tract as against the company, and there is no necessity, under these circumstances, for the enforcement of the rule requiring the specification of a loss as a basis for the selection in question.

Said selection, therefore, was a bar to the allowance of Wagner's entry, and as his sole claim to the land depends upon said entry, I have to direct that the same be canceled as improperly allowed.

It might be added that the record evidences a right of purchase in Kreps under the provisions of section five of the act of March 3, 1887, *supra*, should the company's claim to the land fail, which is clearly superior to Wagner's right under the homestead entry made in December, 1894.

It would seem, then, that, as between Kreps and Wagner, Kreps has the superior rights in the premises.

Wagner's entry having been cleared from the record, leaves only the claim of Kreps as against the company's selection, which selection inures to his benefit under his contract made with the company.

For the reasons herein given it is directed that this tract be submitted for certification on account of the grant, unless other and sufficient reason appear for denying the company's claim.

In this way Kreps will be fully protected under his possession gained through the company.

Your office decision is accordingly reversed.

MINING CLAIM—PLACER PATENT—KNOWN LODE.

DISCOVERY PLACER CLAIM *v.* MURRY.

The patentee of a placer mining claim is under no legal obligation to institute adverse proceedings against a subsequent conflicting lode claim. The lode claimant in such a case has the burden of proof upon him to show that there was a vein within the placer, known to exist, at the time of the placer application, and actual knowledge thereof must be brought home to the placer applicant.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (P. J. C.)

It is not deemed necessary to recite all the record details that are presented in this case. The question raised by the appeal is whether

at the date of the application for patent of the Discovery Placer the Morris G. lode was known to exist within its area. Eliminating therefore all extraneous matter it is shown that the Discovery Placer was located October 4, 1880, and application for patent was filed in the Sitka, Alaska local office October 19, 1888. There was no adverse or protest filed against the same during the period of publication. Final entry was made March 14, 1891, and patent issued thereon September 18 following.

On August 13, 1891, M. W. Murry made application for patent for the Morris G. lode, which conflicts with the Discovery Placer. During the period of publication no adverse was filed.

On December 16, 1891, after the period of publication had expired, the Silver Bow Basin Mining Company, the owner of the Discovery Placer filed its protest against the entry of the Morris G. of the ground in conflict, alleging that there was no lode or vein or rock in place bearing the precious metals within the exterior boundaries of the Morris G. lode which overlaps the placer; and that no such vein or lode was known to the company, or its grantors, at the time the application for patent for the placer was made.

Notwithstanding this protest entry was allowed of the Morris G. May 10, 1892, including the territory in conflict.

Your office on December 6, 1892, informed the surveyor general of the conflict between these two claims; that the lode claim terminates at the point where the vein on its strike intersects the placer and directed a new survey of the remaining portion. In view of this order it was determined by your office that no action was necessary on the protest. No appeal was taken, neither was the amended survey made.

The matter thus rested until 1895, when the Morris G. claimants asked for a patent on their entry under the doctrine of the South Star case (20 L. D., 204).

Your office thereupon ordered a hearing

to determine the question, whether, at the date of application for patent for said Discovery Placer, a lode or vein was known to exist within the limit thereof.

The testimony was taken before a notary public, and on examination thereof the local officers decided that no lode or vein belonging to the said Morris G. claim was known to exist within the limits of the placer at the date of application for patent.

On appeal your office affirmed this finding, and in discussing the question said:

The evidence submitted in this case in my judgment, satisfactorily shows, that a mineral bearing vein or lode was discovered and was known to exist within the limits of the Morris G. lode claim as surveyed before the application for patent for said placer claim was filed, and that the discovery was made at a point about 150 feet in a southerly direction from the southerly boundary line of said placer claim, which point is designated on the official plat as "cut 40' long." The evidence, however, fails to show that the vein or lode discovered within said cut, and uncovered for the distance of forty feet, was known, at the time the placer application was filed, to

extend into the limits of said patented placer claim, and the evidence also fails to show that any vein or lode had been discovered and was known to exist within the ground embraced in said placer at or before the filing of the placer application.

Murry prosecutes this appeal assigning several grounds of error which may be fairly summarized into two propositions; one of fact, that the evidence does show the vein in the placer limits; and one of law; that having found that the lode claim was duly located on the discovery of a vein outside the placer limits before the application for patent was filed and that the discovery and location were known; that this, in law, excluded all of said lode claim as located and it was error to require proof by the lode claimant to show the existence of the lode within the area in conflict.

The formation where these claims are located is shown to be a bed of gravel several feet in depth. Where this gravel has been removed by placer mining the bed-rock is found to be of a slaty character, impregnated with numerous very small veins, or stringers as they are called, running in a north-westerly, and south-easterly direction. These small veins or stringers have never been worked and it is not shown that they can be profitably utilized.

It is claimed by the lode claimant that at a point about one hundred and fifty feet south and outside of the placer limits there was a vein discovered in 1881, upon which the Morris G. was located. It is doubtful whether in this so-called discovery shaft the bed-rock was ever penetrated, or whether there was found a vein or lode in rock in place. The evidence of the plaintiff's witnesses taken by itself is not convincing on this point. They will not confine themselves to any one vein either in the discovery shaft or elsewhere but say there are many of them; that quite an area of land in that vicinity is in a mineralized zone.

Be this as it may, however, it is not shown, or even claimed, that there has ever been any development work done on the Morris G. either inside or outside the placer limits, by its owners, that has developed a vein of any commercial value, or that tends in any way to show that the alleged vein on which it was located intersects the placer limits. There has never been any ore taken from any vein on the lode claim, so far as the testimony discloses, that was or could be used for milling purposes. The only thing ever done on it by its owners, was the discovery cut or shaft, and each year since the location the annual work required by statute, and in doing this there has not been any system of development pursued. This is not only true of the conditions at the present time but at the time of the application for patent for the placer.

The placer people have been working their ground, including that in conflict, every year, and it is shown that the surface of the lode claim in the conflicting territory has been almost, if not entirely worked over to the bed-rock, and that there has not been disclosed therein any vein except the numerous stringers referred to.

But it is insisted that the fact of the location of the Morris G. having been legally made, as claimed, is sufficient in itself to exclude the vein from the placer patent, and in view of the fact that the Discovery people did not file a protest and adverse against the application of the Morris G. and bring suit thereon as provided by statute, there was no necessity for the lode claimant to offer any proof on the question as to whether the vein upon which it was located was known to penetrate the placer limits.

In reply to this it may be said that the Discovery people were under no legal obligation to adverse the Morris G. They already had the government patent for the land in controversy and there was nothing to be gained by any judicial proceeding. The Morris G. is now seeking title to its vein in the placer limits and before the department could, in any event, grant it a patent the burden of proof was upon it to show that there was a vein within the placer known to exist at the time of the Discovery application. This it has, in my judgment, failed to do.

Theory or belief cannot be relied upon as sufficient to warrant the department in issuing a patent for a vein in an already patented placer. There must be actual knowledge brought home to the placer applicants. The supreme court in *Iron Silver Mining Company v. Reynolds* (124 U. S. 374) on page 382, in discussing this subject said:

The statute does not except veins or lodes "claimed or known to exist," but only such as are "known to exist," and it fixes the time at which such knowledge is to be had as that of the application for the patent, etc.

Again as to the means of obtaining this knowledge, it said, on page 384:

There may be difficulty in determining whether such knowledge in a given case was had, but between mere belief and knowledge there is a wide difference. The court could not make them synonymous by its charge and thus in effect incorporate new terms into the statute.

Knowledge of the existence of a lode or vein within the boundaries of a placer claim may be obtained from its outcrop within such boundaries; or from the developments of the placer claim previous to the application for a patent; or by the tracing of the vein from another lode; or perhaps from the general condition and developments of mining ground adjoining the placer claim. It may also be obtained from the information of others who have made the necessary explorations to ascertain the fact, and perhaps in other ways. We do not speak of the sufficiency of any of these modes, but mention them merely to show that such knowledge may be had without making hopes and beliefs on the subject its equivalent.

By none of the methods suggested by the court, or otherwise, has it been demonstrated that the Morris G. vein on its strike enters the placer.

In deciding this case your office relied largely on the case of *Dahl v. Raunheim* (132 U. S., 260). Counsel object to this case being accepted as an authority for the reason that the lode claim there was not located until after the application for patent for the placer claim was filed.

While this is true as a matter of fact, yet the principle announced by the court is applicable in the case at bar. It is said on page 260.

The jury having found a general verdict for the plaintiff must be deemed to have found that no such lode as claimed by the defendant existed when the application of the plaintiff for a patent was filed. We may also add, to what is thus concluded by the verdict, that there was no evidence of any lode existing within the boundaries of his claim, either when the plaintiff made his application or at any time before. The discovery by the defendant of the Dahl lode, two or three hundred feet outside of those boundaries, does not, as observed by the court below, create any presumption of the possession of a vein or lode within those boundaries, nor, we may add, that a vein or lode existed within them.

Counsel for appellant specially directs attention to the case of Goldstein v. Juneau Townsite (23 L. D., 417) wherein small veins or stringers, similar to those found in the land in controversy and being in a mineral belt, were held to be sufficient to warrant the location of a lode claim. But that case has no bearing on the issue at bar. The question there was as to the character of the land. Patent was sought for the land then in dispute for townsite purposes, for which only non-mineral lands may be appropriated, and the question was as to whether or not it was of that character. The department properly held that the presence of these small veins or stringers in a mineral belt were sufficient to impress a mineral character on the land. No such question is involved here. Both parties are claiming the land as mineral, one as a lode claim the other as a placer.

Your office judgment is affirmed.

PRACTICE—REHEARING—ADVICE OF LOCAL OFFICER.

STRAM v. HINES.

A rehearing may be allowed where the contestant relying on the assurance of the local officer, before whom the case was heard, that evidence sufficient to warrant cancellation had been introduced, did not submit further testimony, and it is found on review of the proceedings below that the evidence in the case does not justify cancellation.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (J. L. McC.)

The Department has considered the case of Roman Stram, guardian of minor children of Ollie Moreau v. Louis Hines, involving the homestead entry made by the latter for the N $\frac{1}{2}$ of the SW $\frac{1}{4}$, the SW $\frac{1}{4}$ of the SW $\frac{1}{4}$, and the NW $\frac{1}{4}$ of the SE $\frac{1}{4}$ of Sec. 2, T. 44 N., R. 15, W., Ashland land district, Wisconsin.

The entry was made August 22, 1888. On July 20, 1896, Stram filed affidavit of contest, alleging that "Hines never has settled upon or improved or cultivated or resided upon said land or any part of it."

A hearing was had, at which defendant made default (after service

of notice by publication). From the testimony submitted by the plaintiff the local officers found that the allegations of the contest affidavit had been proved, and recommended the cancellation of the entry.

No appeal was filed; but your office, on November 21, 1896, considered the case, under Rule 48 of Practice, and found and held as follows:

After five years from the date of entry, which in this case expired August 22, 1893, the presumption is, in the absence of any showing to the contrary, that the entryman had earned his claim by compliance with the law. As none of the witnesses had any knowledge of the tract prior to the spring of 1895, a cancellation of the entry would not be warranted from their testimony. The plaintiff failed to sustain his charges, after being afforded full opportunity to do so; and the contest is hereby dismissed.

The contestant has appealed.

Upon an examination of the testimony, the Department concurs in the conclusion reached by your office, that the cancellation of the entry is not warranted by the testimony offered.

In connection with his appeal, counsel for the contestant makes affidavit that at the hearing he, relying upon the statement of the receiver that the testimony already introduced was sufficient to procure the cancellation of the entry—

did not introduce any more evidence on that point, supposing that the evidence introduced was sufficient; and this affiant says that there are several men, who have been well acquainted with said land for more than eight years, since the year 1888, and who know that said land has never been settled upon or improved or cultivated by said Louis Hines, or by any person, and that it has always been vacant and wild land during the whole of said period; and this affiant says that he can and will procure such persons to attend and testify as witnesses in this proceeding:

and he asks that, in case it should be considered that this homestead claim should stand uncanceled upon the records in view of the testimony heretofore adduced,

he be given an opportunity to prove by *other* witnesses the fact that Hines never settled upon the land, and that he never had any improvements or cultivation on it.

Under the circumstances hereinbefore set forth, this would appear to be a reasonable request.

The record is therefore returned herewith; and you are instructed to remand the case to the local officers, whom you will direct to continue the hearing, at as early a date as practicable, after giving all parties in interest due notice of the same. Upon the testimony taken at such hearing the local officers will render such opinion as to them shall seem proper.

The decision of your office is modified as above indicated.

PRACTICE—RULE 35—APPEAL—CERTIORARI.

STILL v. OAKES.

The appointment of a commissioner to take testimony, under rule 35 of practice, is discretionary with the local officers, and their action under said rule will not be disturbed except upon full proof that they have abused their discretion.

An application for a writ of certiorari directed to the local office must be denied, where it is apparent that if the appeal from the action of said office had been forwarded, it would be dismissed.

A writ of certiorari will not issue where it does not appear that the appeal was wrongfully denied, or the record does not disclose facts calling for action under the supervisory authority of the Department.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (L. R. S.)

On August 13, 1897, your office denied the application of Jay R. Still for the issuance of a writ of certiorari to the local land officers, at Mitchell, South Dakota, directing them to forward to your office certain papers, including an appeal alleged to have been filed by said Still in a contest initiated by him against the timber culture entry of the NE. $\frac{1}{4}$ of Sec. 10, Tp. 106 N., R. 49 W., made by Allen Oakes, on April 14, 1883, at said local land office.

Said decision of your office states that on December 26, 1894, said Still filed an affidavit of contest against said entry, alleging that the entryman had not complied with the requirements of the timber culture law, and after due notice upon Oakes a hearing was had, at which both parties appeared and offered testimony; that the local officers rendered their decision against the validity of said entry and refused to grant a rehearing upon the motion of Oakes, who thereupon appealed to your office; that said appeal was dismissed by your office, the decision of the local office was affirmed, and said entry of Oakes was canceled; that said Still made homestead entry of said tract on December 31, 1896, and on January 27, 1897, Oakes filed a motion in your office for a rehearing, and the local office was directed to advise Oakes that he would be permitted to serve a notice upon said Still and the former attorney of said Oakes, one Roger Brennan, requiring them to appear and answer the charges preferred against them in said motion for rehearing; that said Still and said Brennan were duly cited to appear at the local office on April 28, 1897, at which time all parties appeared and were represented by counsel.

It is further stated that, after several continuances, the case was called for trial, and after said Oakes had submitted testimony, said Still filed a motion for a continuance and that a commissioner be appointed to take testimony in the neighborhood of the land, which was one hundred and seventeen miles from said local land office; that said motion for a continuance and for the appointment of a commissioner was overruled by the local officers, on the ground, mainly, that

the letter of your office, dated March 6, 1897, allowing a rehearing, required the register and receiver to hear the testimony and make such recommendation as to them should seem proper; that said Still excepted to said ruling, and, on June 7, 1897, filed an appeal from said action of the local land officers, and on June 20, 1897, the local officers decided that their said action refusing to appoint said commissioner was merely an interlocutory order, from which an appeal would not lie, and they accordingly declined to forward said appeal to your office.

Upon consideration of said application your office denied the same, on the ground that the action of the local officers refusing to appoint said commissioner was clearly interlocutory and not a final decision from which an appeal would lie.

In his application to this Department, counsel for Still "asks that a writ of certiorari may be issued compelling the local office to transmit the appeal from their decision of June 2, 1897," wherein they deny Still the right to take testimony under rule 35 of rules of practice.

Said rule of practice (No. 35, 23 L. D., 597), provides that:

In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

There can be no question that under said rule the local officers are given discretionary authority to appoint a commissioner to take testimony near the land in controversy, and, in the absence of full proof that they have abused their discretion, their action under said rule will not be disturbed. *Doherty v. Robertson*, 12 L. D., 30; *Mechem on Public Officers*, section 1005.

It does not affirmatively appear that the local officers have abused their discretion, in refusing to appoint said commissioner, for the record fails to disclose the specific charges upon which said rehearing was allowed before the local officers, and the only reason suggested in said motion for the appointment of a commissioner to take testimony is the distance of the land from the local land office. Besides, said motion for the appointment of a commissioner was not made by Still until after Oakes had submitted his testimony in chief at the rehearing.

In *Wood v. Goodwin* (10 L. D., 689,) the Department held (syllabus):

While the rules of practice provide for certiorari only in cases where the General Land Office denies the right of appeal, yet the Secretary has the power and authority to issue the writ to the local officers in a case that calls for such action.

Certiorari will not lie to review an interlocutory order of the local office where the ordinary methods of procedure afford relief.

It is not shown that any right has been refused the applicant, and it is apparent that if the appeal from the action of the local officers had been forwarded, it would be dismissed. In such cases certiorari will not issue. *Rudolph Wurlitzer*, 6 L. D., 315; *Forney v. Union Pacific Ry. Co.*, 11 L. D., 430; *Jhilson P. Cummins*, 20 L. D., 130.

Since it does not appear that the appeal from the action of the local officers overruling said motion for the appointment of a commissioner was wrongfully denied, and the record does not disclose facts showing that the applicant is entitled to relief under the supervisory authority of the Department, said application for certiorari must be, and it hereby is, denied. *Johnson et al. v. Beaufort et al.*, 21 L. D., 122.

RAILROAD GRANT—LIMITS—ADJUSTMENT.

SOUTH AND NORTH ALABAMA R. R. CO.

The approved plat on file in the General Land Office, on which the limits of a railroad grant are marked, must determine whether a selection falls within the limits of the grant.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (C. J. W.)

By your office letter ("F") of May 25, 1885, the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 31, T. 7 S., R. 6 W., Huntsville land district, Alabama, included in the list of indemnity selections made by the South and North Alabama Railroad Company, November 3, 1871, were canceled because they were without the indemnity limits of said railroad. On June 18, 1895, said railroad company again selected the said E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 7 S., R. 6 W., 120.18 acres, and also the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 31, T. 12 S., R. 5 W., 39.52 acres.

On May 18, 1896, your office rejected said selections, calling attention to the former cancellation, and holding for cancellation the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 31, T. 12 S., R. 5 W., for the reason that it is also without the limits of the grant and not subject to indemnity selection.

The railroad company has appealed from your office decision, upon the following ground:

It is shown by accompanying plats that the several tracts do lie in the indemnity limits of the grant to the South and North Alabama Railroad by the line as it is of record in the Huntsville local land office, and further that this line is believed to be the correct line, as that office has always so regarded it, and so has the Honorable Commissioner, as is evidenced by the fact that your office, on May 19, 1896, approved to the State of Alabama, for the benefit of this railroad, upon the certificate of the Commissioner, the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 9, T. 12 S., R. 5 W., which tract is located similarly to the ones at bar.

Two reasons are thus presented in support of the contention of the railroad company. One is that the plat on file in the local land office at Huntsville shows the tracts selected to be within the fifteen mile indemnity limits of the railroad, and the other is, that the Department on the certificate of your office has held a tract similarly located to be within said limits. The plat in the local office, referred to in the appeal as the Huntsville plat, was intended to be a duplicate of the approved plat on file in your office. There is no report of the local office with

the record, showing the alleged discrepancy, if it exists. The original plat is better evidence than the intended duplicate, as to the location of the limit line, and the line indicated by it shows the tracts in question to be without the indemnity limits of the road. If it be true, as alleged, that your office certified the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 9, T. 12 S., R. 5 W., to be within the indemnity limits of said railroad, and that the same was approved to the State by the Department, if said tract is in fact not within said limits, the action therein taken does not constitute a precedent to be followed.

The maps on file in your office show said tract to be without the fifteen mile indemnity limits of said railroad.

The objections urged to your office decision are not well founded, and said decision is hereby affirmed.

RAILROAD LANDS—CONFIRMATION—ACT OF MARCH 2, 1896.

WALKER v. UNION PACIFIC R. R. CO.

Under the provisions of the act of March 2, 1896, the title to lands erroneously patented on account of a railroad grant, and sold to a bona fide purchaser, is confirmed. The government in such case must proceed against the company for the recovery of the value of the lands as directed by said act.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (W. A. E.)

On May 18, 1897, the Department directed your office to call upon John Brisben Walker to furnish additional evidence in support of his claim, as a *bona fide* purchaser, to the NE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of Sec. 17, T. 3 S., R. 68 W., Denver, Colorado, land district.

This land is within the primary limits of the grant to the Union Pacific Railroad Company (formerly known as the Denver Pacific Railway and Telegraph Company), the right of which attached August 20, 1869. It was listed by the company on October 16, 1874, and patent issued on April 24, 1875. It appears, however, that patent was erroneously issued for the reason that the land described was covered by uncanceled pre-emption filings at the date when the railroad company's claim under its grant attached.

On May 26, 1891, Walker filed an application to purchase the land under section 4 of the act of March 3, 1887, (24 Stat., 556). This application was rejected by the local officers for want of jurisdiction, but on October 12, 1891, Walker renewed his application, and was permitted to submit evidence in support of his claim as a *bona fide* purchaser.

Protests against the taking of testimony in support of Walker's claim were filed by Henry Strange and Henry Wormington, who had formerly had pre-emption filings on this land, but these protests were disregarded. The local officers, however, declined to consider the evi-

dence submitted by Walker for the reason that the patent to the railroad company was outstanding.

Walker thereupon appealed to your office and Strange and Wormington also appealed from the dismissal of their protests.

By letter of April 30, 1895, your office held that:

As the tracts in question have all been patented to the Union Pacific Railway Company, and a suit has been instituted under the act of March 3, 1887, (24 Stat., 556) to cancel the patents so issued, and since the proof authorized by section 4 of said act can only be made by a purchaser from the railroad company after title to the land has been recovered by the United States, the proof of Mr. Walker is premature.

His application was thereupon rejected, and from this action he appealed to the Department.

It appeared in regard to the suit mentioned in your office letter, that on February 18, 1892, your office had addressed a letter to the Washington attorneys for the Union Pacific Railroad Company, allowing the company thirty days "within which to show cause, in writing before this office, why demand for the reconveyance of the land should not be made as provided by the act of March 3, 1887." No reply was made to this letter by the company, and no further action looking towards the cancellation of the patent was taken by your office or the Department.

Subsequent to the date of your office decision of April 30, 1895, to wit: on March 2, 1896, Congress passed an act (29 Stat., 42) the third section of which reads as follows:

That if at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified, a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a *bona fide* purchaser or are *bona fide* purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a *bona fide* purchaser as aforesaid, or that such persons or corporations are such *bona fide* purchasers, then no such suit shall be instituted, and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Walker's claim as a *bona fide* purchaser was therefore considered by the Department under this act. As it was not shown that the protestants had any interest in the land involved the protests were dismissed and the matter was considered as solely a question between Walker and the government.

Walker claimed through mesne conveyances from the company, but he submitted only oral evidence in support of his claim and it was held by the Department that the best evidence of a transfer by deed is the

deed itself, or a certified copy thereof, that the evidence submitted by him was only of a secondary character, and that it was insufficient in the absence of any showing that the deeds, or certified copies thereof, could not be furnished, and you were therefore directed to call upon Walker to furnish this additional evidence.

The Department is now in receipt of your office letter of November 3, 1897, transmitting with favorable recommendation certified copies of the several deeds upon which his claim as a *bona fide* purchaser is based.

It appears from these that the Denver Pacific Railway and Telegraph Company (of which the Union Pacific Railroad Company is the successor) deeded this land to Horace A. Gray and Peter G. Bradstreet; that Gray transferred his interest to Margaret P. Evans; that Evans and Bradstreet deeded the land to John Brisben Walker; and that Walker transferred it to the Highland Park Company, which deeded it to the Berkeley Farm and Cattle Company, which in turn deeded it back to Walker.

Walker's title accordingly stands confirmed under the provisions of the above cited act of March 2, 1896. You are directed to make demand upon the company for the minimum government price of the land, to the end that, should it refuse to pay, steps may be taken looking to the institution of suit to recover the value thereof through the courts, as contemplated by said act.

HOMESTEAD—NON-MINERAL AFFIDAVIT—PRACTICE—REHEARING.

CORBIN *v.* DORMAN.

A non-mineral affidavit of a homesteader alleging personal knowledge of the land, when in fact the affiant had no such knowledge, while valueless as evidence of the character of the land, does not render the entry illegal, and, in the absence of any charge that the land is mineral in character, the defect may be cured by filing a proper affidavit.

A motion for rehearing on grounds not in issue at the original hearing must be denied by the Department, but such action does not preclude the General Land Office from subsequently directing an inquiry, in the nature of a new contest, to determine questions that have arisen since the hearing on the original suit.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (W. A. E.)

On May 9, 1895, Alice E. Dorman made homestead entry for the NE. $\frac{1}{4}$ of Sec. 10, T. 106 N., R. 75 W., Chamberlain, South Dakota, land district.

Contest affidavit, alleging prior settlement, was filed by Thomas B. Corbin on June 18, 1895.

Hearing was had August 12, 1895, and as a result thereof the local officers found in favor of the plaintiff.

On appeal your office affirmed the decision below, whereupon the defendant filed further appeal to the Department.

The first question presented is in regard to the legality of the defendant's entry. It appears that she was never on the land in controversy until after the date of her entry, but at the time she made entry she filed a non-mineral affidavit, in which she swore that

she is well acquainted with the character of said described land, and with each and every legal subdivision thereof, having frequently passed over the same; that her personal knowledge of said land is such as to enable her to testify understandingly with regard thereto; that there is not, to her knowledge, within the limits thereof, any vein, etc.

The register and receiver held, in their opinion, that

if the entry of Alice E. Dorman is not absolutely null and void, it is certainly voidable, made so by her false oath at the time of making her entry, and that it is a defect which can not be cured in the presence of an adverse claim.

The filing of a non-mineral affidavit is not a statutory requirement, but a departmental regulation, based primarily upon section 2302 of the Revised Statutes of the United States, which provide that:

No distinction shall be made in the construction or execution of this chapter on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

This affidavit is required by the Department for its own satisfaction, and in the absence of any showing or allegation to the contrary is accepted as *prima facie* evidence of the non-mineral character of the land applied for. In order that the affidavit may be of value it is necessary that the person who swears to it should be personally acquainted with the land and testify to its character from actual, personal knowledge, hence the rule that this affidavit can not be made on information and belief. Where it is shown, as in the present case, that the party who makes the affidavit is, as a matter of fact, unacquainted with the land at the time, the effect is to destroy the value of the affidavit as evidence of the non-mineral character of the land. The entry is not, however, thereby rendered illegal, and in the absence of any charge or allegation that the land is mineral in character, the defect may be cured by the filing of a proper affidavit. The tract here involved is open prairie land, and there is no allegation that it is mineral in character.

As to the respective rights of the two claimants, the testimony on behalf of the plaintiff shows that he made settlement on the tract in controversy on May 6, 1895, by moving thereon a small box house, which he furnished, and in which he resided from May 6, 1895, up to the date of the hearing, except for short absences on business. He also built a corral on the 7th of May.

On behalf of the defendant several witnesses testify that they were on and over this tract on the 7th, 8th, and 9th of May, 1895, and that they saw no building or other evidences of settlement until the afternoon of the 9th, when a small house was moved on the land. The defendant herself was never on the tract in controversy prior to entry.

She established her residence on the land on May 27, 1895, and has since resided there.

The positive testimony of the plaintiff's witnesses that he settled on the land in dispute on May 6, 1895, prior to the date of the defendant's entry, is not successfully contradicted by the negative evidence furnished by the witnesses for the defense. Moreover, defendant's witnesses admit that they saw Corbin's house on the land on the afternoon of May 9, 1895, the day the entry was made, and it is not shown at what hour of the day the homestead application was filed. It must be held therefore that the plaintiff's claim was initiated prior to that of the defendant.

On September 27, 1897, the defendant filed a motion for rehearing on the ground of newly discovered evidence. It is alleged that as the plaintiff's claim is based on settlement and residence, it is necessary for him to maintain residence on the land, but that he has, since the hearing in this case, abandoned his residence on the tract in controversy and is now a resident of Chamberlain, South Dakota, where he voted in the November election of 1896. Defendant asks that a new or additional hearing be ordered to enable her to prove these allegations as it would be unjust to her to hold her entry for cancellation under the present state of facts.

This case is similar to that of *Griffin v. Smith* (25 L. D., 329). There the decision of the Department was in favor of the contestant, who alleged prior settlement. Motion for rehearing on the ground that the contestant had abandoned the land since the date of the hearing was denied for the reason that none of the matters set out in the motion was in issue at the hearing or when the decision of your office was rendered. In promulgating the decision of the Department, however, your office directed the register and receiver to notify the contestant of the action of the Department, and in case he applied to perfect his application that the defendant be given an opportunity to show that the contestant had abandoned the land and was no longer entitled to enter. In pursuance of these instructions, the register and receiver ordered a hearing at the proper time to determine whether or not the contestant had abandoned the land. As a result of this hearing the local officers rejected his application and held the defendant's entry intact. This action was subsequently affirmed by your office and by the Department. It was held that a decision of the Department, denying a motion for rehearing on the ground that the matters therein alleged were not in issue at the original hearing, does not preclude the Commissioner of the General Land Office, in the exercise of his original jurisdiction, from subsequently directing an inquiry, in the nature of a new contest, to determine questions arising since the hearing of the original suit.

The present case will be disposed of in accordance with the method adopted in the case cited. The motion for rehearing is denied, and on

the record as it is now presented to the Department your office decision is affirmed and the defendant's entry is held subject to the plaintiff's superior right. This action will not, however, preclude your office from directing an inquiry, in the nature of a new contest, to determine questions that have arisen since the date of the original hearing.

APPLICATION FOR SURVEY—ISLAND.

DIEDRICK C. GLISSMAN.

An application for the survey of an island, in a meandered non-navigable river, existing at the date of the township survey but omitted therefrom, must be denied, where the right of the riparian owners to the bed of the stream is recognized by the State in which the land lies.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (C. W. P.)

On March 10, 1897, you submitted the application of Diedrick C. Glissman, of Great Bend, Kansas, for the survey of an island in the Arkansas River, described as being "known and recognized as the south island in said river," and, according to the diagram submitted by the applicant attached to the application, shown to be in sections 1 and 6 of township 20 south, ranges 12 and 13 west, Kansas, while in the application its location is described as being partly in sections 31 and 36, township 19 south, ranges 12 and 13 west, and sections 1 and 6, township 20 south, ranges 12 and 13 west, Kansas.

The joint affidavit on page 2 of the application shows that the island contains about forty acres of land; that the width of the channel on the north side of the island is about four hundred feet and on the south side about two hundred and fifty feet, and the depth thereof at ordinary stages of the water is about two and a half feet; that the island is about three feet above high water mark, not subject to overflow, and the land fit for agricultural purposes, with improvements thereon shown to consist of "a drove well" and one acre of land plowed, and "a dugout," put up by applicant as a residence, and valued at about twenty dollars.

Notice of the application for the survey is shown to have been served upon John Rogers, Emma L. Hamilton, Margaret Harris, and D. N. Heezer, as owners of the lands on the shores opposite to the island, none of whom appears to have acknowledged the service of notice. But John Rogers has filed a protest against the approval of the application, claiming that as owner of section 1, the island belongs to him under the laws governing riparian rights, (which protest accompanied your letter of transmittal,) and in the affidavit of Mrs. Emma Hamilton and A. W. Hamilton, attached to the protest, it is stated that the Arkansas River is at no time navigable at or anywhere near the location of the island.

The township was surveyed in October, 1871, and the official plat of the survey shows an unsurveyed island in the locality described in the application and represented upon the diagram accompanying the application.

In the case of John C. Christensen (25 L. D., 413), a survey was denied of a small island in a meandered, non-navigable river, shown to have been in existence at the date of the survey of the township embracing the same, viz., in 1877, where the right of the riparian owners to the bed of the river is recognized by the State in which the land lies.

It appears that that portion of the Arkansas River in which this island lies is non-navigable, and in the case of *Wood v. Fowler*, 26 Kansas, 682, the doctrine of the common law that a grant of land bounded by an unnavigable stream carries with it the bed of the stream to the center of the thread thereof, appears to be recognized.

The facts in the case at bar are essentially the same as those in the case of John C. Christensen, *supra*, and the application of Mr. Glissman must be denied.

HOMESTEAD ENTRY—APPLICATION—GOOD FAITH.

MONTAYO *v.* TRUJILLO.

Under the provisions of section 2, act of March 2, 1889, a second homestead entry may be allowed, where the first was made prior to the passage of said act, but was afterwards canceled for failure to make final proof within the statutory period.

A non-mineral affidavit, sworn to before a notary public, and forwarded to the local office with the fees and commissions required on making homestead entry, can not be regarded as an application to enter, and operating to segregate the land. To justify the allowance of a homestead entry of land made valuable by the money and labor of a prior adverse settler, who is in default in the matter of filing application, it should clearly appear that the subsequent claimant is acting in entire good faith.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 9, 1897. (W. A. E.)

On June 15, 1893, Crescentio Trujillo made homestead entry for the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 20, T. 10 N., R. 13 W., Sante Fe, New Mexico, land district.

On October 11, 1893, Encarnacion Trujillo y Montayo filed affidavit of contest against this entry, alleging a prior right to said tract, and charging that the defendant was disqualified by reason of having made a former entry.

A hearing was had on December 1, 1893, and resulted in a decision by the local officers in favor of the defendant.

On appeal your office, by letter of June 2, 1894, reversed the action of the register and receiver, and held the defendant's entry subject to the plaintiff's superior right.

The defendant's appeal brings the matter before the Department.

It was shown at the hearing that one Crescentio Trujillo (identified by one of the witnesses for the plaintiff as the defendant in this case) made homestead entry for the SE. $\frac{1}{4}$ of Sec. 12, T. 14 N., R. 10 W., at the Santa Fe land office, on April 18, 1885; and that said entry was canceled on March 28, 1893, on account of the expiration of the statutory period. The defendant, however, in his entry papers denied that he had ever made a prior entry; and re-affirmed this statement at the hearing.

The plaintiff, Montayo, settled on the land in controversy in 1889, and has since resided there. His improvements, consisting of a house, corral, fencing, breaking, etc., are worth about five hundred dollars. In the spring of 1890, he entered into a partnership with the defendant for the purposes of sheep raising and farming, the expenses and profits to be shared between them. Incidentally to this partnership and by permission of the plaintiff, the defendant took up his residence on the land. For a while he lived in the same house with the plaintiff. Afterwards he fitted up a little house that had been built on the land by a former claimant, and moved into that. His improvements at the date of the hearing seem to have been almost entirely such as he had made in connection with the plaintiff under their partnership agreement.

On June 5, 1893, the plaintiff sent to the local land office, by mail, a non-mineral affidavit, executed before a notary public. In this affidavit he set forth, *inter alia*, that he was the identical person "who is an applicant for government title" to the land in dispute, describing the same. With said affidavit he transmitted twenty-two dollars, in payment of the required fees and commissions. The receiver, on the same day, returned to the plaintiff the affidavit and money, saying in the letter of transmittal:

I received this morning the enclosed non-mineral affidavit, which I presume you intended to make a homestead entry, but you will have to have a full set made out, of which I enclose blanks; and I also state that these papers can not be made out before Mr. Block as a notary public, nor any other notary public.

On June 27, 1893, the plaintiff executed and forwarded preliminary homestead papers, which were returned, for the reason that the land was not open to entry, the defendant herein having made entry therefor on June 15, 1893.

It is not necessary to consider the testimony bearing on the question as to whether or not the defendant had made a prior homestead entry, in view of the fact that even if it be found that he had made homestead entry in 1885 for another tract, as alleged, under which he had not perfected title, he would not be disqualified.

In the recent case of *Hertzke v. Henermond* (25 L. D., 82), it was held (syllabus) that:

Section 2, act of March 2, 1889, provides for the allowance of a second homestead entry in any case in which the applicant, prior to the enactment of the statute, made entry under the homestead law but has not perfected title thereunder, either before or since that time.

The non-mineral affidavit, sworn to before a notary public by the plaintiff and forwarded, with the fees and commissions, to the local office on June 5, 1893, can not be considered as a legal application, in fact it can hardly be called an application at all. Though it evidenced his desire and intention to enter the tract in controversy it had no more effect, so far as the segregation of the land was concerned, than an oral declaration of intention to enter would have had. (See *Rhodes v. Crocker*, 15 L. D., 249.) At the time, then, that the defendant made entry, this tract was vacant public land, subject to entry, and the case narrows down to the sole question as to whether or not the defendant acted in good faith in making this entry.

In the case of *Lee v. Johnson* (116 U. S., 48-52), the United States supreme court cites with approval the statement of the Secretary of the Interior that the element of good faith is the essential foundation of all valid claims under the homestead law.

In *Russell v. Gerold* (10 L. D., 18), it was said:

It must be remembered that good faith is required of every applicant for any part of the public domain.

In the case of *Johnson v. Johnson* (4 L. D., 158), it was held that under no circumstances will the Department knowingly permit itself to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right.

See also *Smith v. Kingdom et al.*, 11 C. L. O., 56; *Dickson v. Schlater*, 2 L. D., 597; *Callahan v. Burke*, 4 L. D., 170; *Dayton v. Hause et al.*, id., 263; *Caldwell v. Carden*, id., 306; *Turner v. Bumgardner*, 5 L. D., 377; *Emily Lodé*, 6 L. D., 223; *Blake v. Marsh*, 10 L. D., 612; *Massey v. Malachi*, 11 L. D., 191; *Tustin v. Adams*, 22 L. D., 266; *Shook v. Douglas*, id., 646.

The mere fact that a party settles upon or makes entry for land embraced in the claim of a prior settler does not in itself warrant the finding of bad faith. A settler can not hold a piece of public land indefinitely by residence and improvements, without some claim of record, no matter how valuable his improvements may be. In order, however, that the subsequent claim may defeat the rights of the prior settler, two things must clearly appear: first, that the prior settler is guilty of laches in not following up his prior right within the statutory period, or is disqualified, and, second, that the subsequent claimant is acting in entire good faith. If either of these elements is lacking, the rights of the prior settler are not defeated by the subsequent claim.

It has been held by the Department that while a homestead entry of lands chiefly valuable for the timber or stone thereon is allowable, yet such entry should be carefully scrutinized in order to ascertain whether the entryman is acting in good faith. *Porter v. Throop*, 6 L. D., 691; *Wright v. Larson*, 7 L. D., 555; *John A. McKay*, 8 L. D., 526. The same principle would apply to an entry of lands improved and made valuable by the money and labor of a prior settler who is in default in

the matter of filing his application. Such an entry is allowable, but it should be carefully scrutinized to ascertain whether the entryman is acting in good faith.

Applying these general principles to the case at bar, it is evident that the plaintiff was guilty of laches in not filing his application during the statutory period of protection accorded a settler, but can it be said that the defendant has acted in good faith? He went on the land in pursuance of a partnership agreement with the plaintiff for the purpose of farming and sheep raising; he resided for a while in the plaintiff's own house, afterwards by permission of the plaintiff, in a small house that had been built on the land by a former claimant; he knew, as appears from the testimony, that the plaintiff intended to enter the land as soon as he could raise the money; he did not notify the plaintiff in any way that he intended to claim the land; he takes care not to arouse the plaintiff's suspicions, but slips off quietly to the land office and makes entry, and the first the plaintiff knows of it is when his application is returned with the information that the land has been entered by the man he has trusted and permitted to live on the land with him, part of the time in his own house.

The defendant's bad faith is apparent, and the Department will not lend its aid to the perpetration of such a fraud. Your office decision is accordingly affirmed, and Trujillo's entry will be held subject to Montayo's superior rights.

RAILROAD GRANT—INDIAN OCCUPANCY.

LEVI ET AL. v. NORTHERN PACIFIC R. R. CO.

The occupancy of land by an Indian, at the date when the Northern Pacific grant became effective, and prior to the act of July 4, 1884, will not serve to except such land from said grant, if at such time the Indian had not abandoned the tribal relation.

Assistant Attorney-General Van Devanter to the Secretary of the Interior,
December 11, 1897. (W. C. P.)

Acting Secretary Ryan referred to me, with request for an opinion upon the various questions therein presented, a letter from the Commissioner of Indian Affairs, and accompanying papers, in relation to the controversy between Levi, Three Mountain and Enoch, members of the Upper Middle bands of Spokane Indians, and the Northern Pacific Railroad Company, as to certain lands in the State of Washington.

Levi claims the SW. $\frac{1}{4}$ of Sec. 27, T. 26 N., R. 41 E., Three Mountain claims the NE. $\frac{1}{4}$ of Sec. 33, T. 26 N., R. 41 E., and Enoch claims lots 1, 6 and 7 and the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 35, T. 27 N., R. 41 E.; while the Northern Pacific Railroad Company claims all these tracts under its grant.

These tracts are all within the primary limits of the grant to said company, the map of definite location of the main line opposite them

having been filed October 4, 1880. At that date Levi and Three Mountain were in the possession and occupancy of the tracts respectively claimed by them, and it is insisted by the Commissioner of Indian Affairs, in their behalf, that such occupancy and claim was sufficient to except those tracts from the operation of the grant. On the other hand, it is claimed by the railroad company, and held by the Commissioner of the General Land Office, that the possession and occupancy of these lands by the Indians was unauthorized, because the homestead privilege was not conferred upon tribal Indians until the passage of the act of July 4, 1884 (23 Stat., 96), and that therefore there was not such claim as would take these lands out of the operation of the grant. It may be stated, in this connection, that the company has refused to waive its claim to these lands and take other tracts in lieu thereof under the provisions of the act of June 22, 1874 (18 Stat., 194).

By the act of March 3, 1875 (18 Stat., 402-420), the benefits of the homestead law were extended to

any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations.

This privilege was extended by the act of July 4, 1884 (23 Stat., 76-96), to

such Indians as may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate.

If any of these Indians had severed his tribal relations prior to October 4, 1880, the date at which the company's rights attached, and also had the other qualifications prescribed by the act of March 3, 1875, his occupancy of the land was that of a qualified homestead claimant, and as such sufficient to except the tracts so occupied and claimed from the operation of the grant.

If, however, it be that these Indians had not abandoned their tribal relations, then they had no claim by reason of their occupancy of any tract of the public land recognized by law, and such occupancy would not serve to except the tracts from the grant.

In the case of *Northern Pacific Railroad Company v. Te Quda* (11 L. D., 304) it was shown that the map of definite location was filed March 26, 1884, more than three months prior to the passage of the act of July 4, 1884, and it was said:

The company's rights finally attached on definite location, and at that date no provision had been made by which an Indian still retaining his tribal relations, could acquire any rights to the public lands, either by settling thereon, or by occupying the same for purposes of cultivation. It is true that by departmental regulation of February 11, 1870 (1 C. L. O., 283), and by the act of March 3, 1875 (18 Stat., 420), certain homestead privileges were extended to Indians. These privileges were allowed, however, only to such Indians as had wholly dissolved, or abandoned, their tribal relations, of which fact satisfactory proof was required. The Indian, Te Quda, had not abandoned his tribal relations, but still retained the same at the date of his application. He cannot, therefore, be held to have acquired any right to the land in question as against the company, by his improvement and cultivation of a portion thereof, as claimed.

As holding to the same effect, the following cases may be cited: *Spicer et al. v. Northern Pacific R. R. Co.* (11 L. D., 50), *Northern Pacific R. R. Co. v. Salssboo* (18 L. D., 305), *Northern Pacific R. R. Co. v. Old Charley et al.* (18 L. D., 549), *Palouse v. Oregon and California R. R. Co.* (20 L. D., 401), *Kinswa v. Northern Pacific R. R. Co.* (21 L. D., 457).

The question as to whether these Indian claimants had abandoned their tribal relations, is one of fact rather than of law. So far as the facts are shown, they do not indicate that either of them had abandoned his tribal relations. They all accompanied the bands to the reservations to which they were to remove under the terms of the agreement of 1887 and have continued to reside there since that time. This fact alone justifies the conclusion that they had not abandoned their tribal relations.

In the matter of the claim in behalf of Enoch, it was first contended that his occupation of the SE. $\frac{1}{4}$ of Sec. 19, T. 25 N., R. 43 E., served to except that tract from the grant. It seems, however, that in 1883 he relinquished all claim to that tract upon the payment to him by the railroad company of the sum of \$2000. The claim in his behalf is now for lots 1, 6 and 7 and the NE. $\frac{1}{4}$ of Sec. 35, T. 27 N., R. 41 E., upon which it is said he lived from 1881 until his removal to the reservation in 1895. It is further claimed that these tracts were occupied by Enoch's father-in-law, Johnnie Meyers, for many years. Patent has been issued to said company for these tracts, and the Commissioner of the General Land Office correctly held that they had passed out of the jurisdiction of this Department. Nothing is shown, by the papers now before me, as to the status of Johnnie Meyers, or the character of his occupancy of said tracts, and hence there is nothing upon which to base a conclusion as to whether a suit ought to be instituted to set aside said patent.

In conclusion, I have to advise you that there is, in my opinion, nothing presented in the papers submitted to justify a conclusion differing from that of the Commissioner of the General Land Office to the effect that the occupancy of the tracts in question by these Indians did not constitute such claims as served to except them from the grant to the Northern Pacific Railroad Company.

Approved, December 11, 1897.

C. N. BLISS, *Secretary*.

ALASKAN LANDS—GRECO-RUSSIAN CHURCH LANDS.

OPINION.

All lands owned by the Greco-Russian church in Alaska at the time of cession continue to be the property of said church without diminution or enlargement in quantity. The possessory right subsequently conferred by Congress does not affect lands owned by said church at the time of the treaty, but only extends to public lands, occupied as mission stations at the date of such Congressional action, not exceeding six hundred and forty acres in any one tract.

The present jurisdiction of the Interior Department over any Greco-Russian church lands, or missionary stations in Alaska, is limited to excluding the same from entry and acquisition by others under the mining, townsite, or trade and manufacture laws.

No statutory provision has been made that authorizes any separate and independent proceeding for the survey and identification of the church lands in Alaska, the ownership of which was secured to the resident members of the church by the treaty of cession.

The scope of paragraph 24, in the amended departmental regulations of June 3, 1891, is limited to the consideration of private claims, and the claims of the Greco-Russian church, when asserted adversely to an application to enter lands for townsite purp

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,
December 11, 1897. (H. G.)*

I have the honor to acknowledge the receipt of your reference dated October 28, 1897, of papers relating to the status of the lands claimed by the Greco-Russian church, in the District of Alaska, with a request for an opinion as to the correctness of the decision of the Commissioner of the General Land Office of January 19, 1897, on survey number 59, in said district, and also for reconsideration of departmental decision of March 21, 1896, (22 L. D., 330) in connection with paragraph 24 of regulations of June 3, 1891, (12 L. D., 583) as amended February 17, 1896, (22 L. D., 119) to determine the legality of such latter decision.

Accompanying this reference is a communication of September 27, 1897, from the State-Department transmitting, for the consideration of this Department, a copy of a letter from the bishop of the Greco-Russian church of Alaska and the Aleutian Islands, which was presented to the State Department by the Charge d'Affaires of Russia at this capital.

The Bishop Nicholas, in his letter, complains that certain property in Alaska belonging to the orthodox church has been appropriated by other parties in violation of article 11 of the treaty between the United States and Russia, concluded March 20, 1867, and requests:

1. That a commission should be sent to Alaska to survey and determine the boundaries of the church lands.
2. That the church should be put in possession of those lands at Unalaska, Belkofsk and Kadiak, which were recognized by Mr. Jackson as corresponding to the plans and descriptions signed by Mr. Peshtehurof.
3. That the plan which he submitted last year, concerning their possession at St. Michael's, should receive the government's sanction.

The bishop's letter contains another ground of complaint which is not submitted for your consideration by the Department of State, namely:

(d) Lastly, that the Alaska Trading Company should be ordered to pull down such of their buildings as were placed on our land after the 14/26th of July, 1897, and to move our house back to its old place, with the alternative of paying us the sum of \$5,000 for the land unlawfully taken from us.

As complaints of the nature of this last one can only be considered by the courts it was probably for that reason eliminated by the Department of State from the matters referred to this Department.

It appears that the communication from the Department of State was, on September 30, 1897, referred by you to the Commissioner of the General Land Office for report thereon and that on October 25th the report of that officer was received. In this report the Commissioner states that survey No. 59, in Alaska, applied for by Marcus E. Sloss; under the act of March 3, 1891, (26 Stat., 1095-99) embracing 109.07 acres of land, at St. Michael's, Alaska, was on January 19, 1897, suspended on account of irregularity in shape, since which date no further action has been taken in the premises. Prior to this action by the Commissioner of the General Land Office, it appears that, under date of June 8, 1896, he notified Bishop Nicholas that such survey included in its exterior boundaries certain lands occupied by the church at that point, and that the survey excluded only 1.20 acres around the church; that under section 14 of the act of Congress of March 3, 1891, *supra*, all tracts of land, not exceeding six hundred and forty acres in any one tract, occupied as missionary stations in the district of Alaska, were excepted from entry under said act, and the bishop was requested to furnish the General Land Office

with a diagram and description showing such amount of land, not exceeding six hundred and forty acres which you (the bishop) desire reserved for said church at St. Michael's, that this office (General Land Office) may have same excluded from the claim of said Marcus E. Sloss.

No response appears to have been made to said letter, but the survey having been suspended the failure of the bishop to respond is not material. The suspending of the survey did not in any manner affect the claim of the Greco-Russian church but left that matter wholly undecided. The letter of the Commissioner to the bishop does not purport to be a decision, but there is an error therein which ought not to pass unnoticed. Any claim of the Greco-Russian church respecting lands in Alaska must be either (1) a title existing at the time of and protected by the treaty, or (2) a right to possess and occupy public lands as missionary stations under the acts of Congress hereinafter cited. Whatever lands were owned by the church at the time of the cession continue to be owned by it without diminution or enlargement in quantity, so that the extent of the claim at the time of the cession is its limit now. The possessory right conferred by Congress does not affect lands owned by this church at the time of the treaty but only extends to public lands "now occupied as missionary stations," not exceeding six hundred and forty acres in any one tract. In the one instance the claim is limited to the land owned at the time of the cession, and in the other to the land occupied for missionary stations. In neither instance is the extent of the claim dependent upon or affected by the present desire or request of the bishop, as seems to be implied in the letter of the

Commissioner. It should be noted, however, that the Greco-Russian church has not asserted any claim to public lands occupied as missionary stations, but has entirely confined its claim to the assertion of a right and title obtained from Russia, and protected by the treaty.

If the Sloss survey had been approved by the Commissioner, Sloss would have been required to apply, in writing, to the proper officers in Alaska for permission to make proof and entry of the surveyed land and to give notice thereof by publication, reciting the name of the applicant, the geographical location of the land, the place and date of making proof, and the names of four witnesses by whom it was proposed to establish the right of entry. This publication is made in the newspaper nearest the land, and copies thereof must be posted in conspicuous places thereon. Upon the day appointed for making the proof any person may appear and protest against the allowance of the entry, or inaugurate a contest. (Departmental Regulations 20, 22, 12 L. D., 583, 590-1). In this manner any claim by the church to any part of the land included within the application to enter could be fully protected. Perhaps it was the intention of the Commissioner of the General Land Office, by his letter of notification to Bishop Nicholas, to afford the latter ample opportunity to assert any claim of the Greco-Russian church to the tract then in question.

The only legislation affecting missionary stations in Alaska is found in section 8 of the act of May 17, 1884, (23 Stat., 24) and sections 11-14 of the act of March 3, 1891, (26 Stat., 1095). The first act extended to Alaska the laws of the United States relating to mining claims, but expressly withheld the general land laws from operation therein, and the second act authorized the entry in that district of lands for town-sites and for the purpose of trade or manufacture. Both statutes contained reservations excepting from entry thereunder lands occupied as missionary stations. The reservation in the act of 1884 reads:

Provided, that the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress. . . . *And provided also,* That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress.

And the reservation in the act of 1891 reads:

And all tracts of land not exceeding six hundred and forty acres in any one tract, now occupied as missionary stations in said district of Alaska, are hereby excepted from the operation of the last three preceding sections.

That the provisions of these two statutes authorizing the entry and acquisition of land in Alaska are necessarily limited to public land, is obvious, for the reason that the United States cannot dispose of land which is not public. Any land, the right and title to which was

acquired from Russia by the Greco-Russian church is not public land and is not subject to entry or acquisition under these statutes. Independently of these private lands the acts of 1884 and 1891 gave this church a possessory claim to such public lands, not exceeding six hundred and forty acres in any one tract, as were then occupied by it as missionary stations, but no manner of securing title thereto has been provided by Congress. The words "now occupied" in these two statutes refer to the dates when the same were approved and hence only reserve and protect such land as was then used as missionary stations. *Catholic Bishop of Nesqually v. Gibbon* (158 U. S., 155, 167, 168.)

The departmental decision of March 21, 1896, (22 L. D., 330), taken in connection with paragraph 24 of the Regulations of June 3, 1891 (12 L. D., 583) as amended February 17, 1896 (22 L. D., 119), appears to have announced a proper conclusion. It is based upon a former complaint of Bishop Nicholas, in which he requested that this Department give orders:

First. To have the lands unlawfully taken returned to the orthodox parish in Sitka.

Second. To have a survey made of all the church lands in Alaska.

Third. To affirm the right of ownership of the parishes to their lands in the same manner as it was given them by the Russian government at the time Alaska was transferred to the American government.

It was said in that decision:

In reply to the second and third requests, it can only be said that Congress has not provided any method by which the extent or title of these claims can be determined, and until then, this Department can not pass upon them, (and further:) As to the inclusion of any church property within the limits of an executive reservation, it is quite clear that the President has the authority to modify any order reserving land by reducing the limits of the reservation so as to exclude that erroneously included. See opinion of Assistant Attorney General Hall, dated February 27, 1896. (22 L. D., 330, 336).

Referring to the property of the Greco-Russian church at Sitka, known as the Cathedral Church of St. Michael and the Church of the Resurrection, the opinion of Assistant Attorney General Hall, above cited, (unpublished) says:

This property was never delivered to the United States as property acquired by them under the treaty, and, in my opinion, it should be treated as the property of the Greco-Russian church, to the extent that it was set apart by the commissioners hereinafter referred to, pursuant to the treaty of 1867, until Congress shall take some action thereon. The Department of the Interior is without power to grant the relief asked for, as the public surveys have never been extended over Alaska, and Congress has not yet provided the means of ascertaining to what extent the Greco-Russian church is entitled to property in Alaska.

Present relief can be granted, however, by the President; if the church has been deprived of some of its property by executive order, that order can be modified so as to re-instate the church in possession of such property as was turned over to it by the commissioners aforesaid.

Thereafter, (29 Stat., 883) the former executive order of June 21, 1890, was modified and the reservation created thereby diminished by exclud-

ing the property mentioned as belonging to the Greco-Russian church at Sitka. The nature, extent and character of this property is set forth in the former departmental decision (22 L. D., 330, 332), and is found in inventory "B," made by the commissioners appointed by the respective governments to make the transfer of Alaska to the United States. These commissioners furnished certificates to the persons holding property in fee simple at Sitka, and "distinguished between public and private property." Their duties were simply ministerial, and the making of these inventories was simply a matter of convenience and a method of determining *prima facie* what property the government should appropriate to itself for the time being and what should be left to the individual proprietors. *Kinhead v. United States*, 150 U. S., 483, 494.

No other place in Alaska, except Sitka, was visited by the commissioners, whose report shows that fact and particularly that "Kodiak" was not visited and that no action was taken touching the affairs of that place.

With the exception of Sitka, there is not even a *prima facie* finding by these commissioners of the nature and extent of the property of the Greco-Russian church in Alaska, although the Russian commissioner did make a report as to the claims of the church in the settlement of Illuluk, on the Island of Ounalashka, on June 2-14, 1868, about eight months after the formal transfer of the ceded territory—a report in which the commissioner of the United States did not join. This paper, as Dr. Jackson remarks in his communication referred to in the letter of the Commissioner of the General Land Office accompanying your reference, is an indication of the land claimed by the Oriental Greek Church at the time it was made; but Dr. Jackson states that the land claimed covers ground upon which stands the United States custom house and two private residences, and that at the time the Russian Commissioner made the declaration for the church, the lots so occupied by the custom house and these private residences were occupied by Koh and Company, in buildings secured by them from the Russian-American Company.

The failure of the commissioners to jointly inventory or issue certificates for church property, at any place other than Sitka, does not defeat the claim of the church to lands then owned by it. In *Kinhead v. United States*, *supra*, the supreme court says:

It is quite clear, however, that it was never intended to invest the commissioners with judicial power to determine the title to property in Sitka; or to pass finally upon the question whether a particular building passed under the treaty or not. . . . The truth is, the powers of the commissioners were simply ministerial, and the making of inventories simply a matter of convenience, and the method of determining *prima facie* what property the government should appropriate to itself for the time being, and what should be left to the individual proprietors. To treat this inventory as binding either upon the government or individuals would be to acknowledge that the commissioners were invested with judicial powers to determine the title to property.

Article II of the treaty of cession contains the following guaranty:

In the cession of territory and dominion made by the preceding article are included the right of property in all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private individual property. It is, however, understood and agreed, that the churches, which have been built in the ceded territory by the Russian government, shall remain the property of such members of the Greek Oriental Church resident in the territory as may choose to worship therein. (15 Stat., 539, 541.)

The present jurisdiction of this Department over any Greco-Russian church lands or missionary stations in Alaska, extends only to excluding the same from entry and acquisition by others under the mining, town-site and trade and manufacture laws aforesaid. Since only public lands, not otherwise reserved by law, can be disposed of under these laws, it necessarily follows that the Department must in each case determine whether the land sought to be entered is public land and whether it is by law reserved for missionary stations or otherwise. To this extent, and as a necessary incident or condition to the allowance of mineral, town-site, trade or manufacture entries, is the Department now empowered to determine the rights of the Greco-Russian church in Alaska, whether it be to church lands claimed in fee under the treaty of cession or to missionary stations, only the possession of which is claimed under the acts of 1884 and 1891.

There has been no legislation authorizing or providing any separate and independent proceeding for the surveying and identifying of the church lands in Alaska, the ownership of which was secured to the resident members of the church by the treaty of cession.

In the report of the Commissioner of the General Land Office, referring to the report of Dr. Jackson upon the claim of the Oriental Greek Church to lands in Alaska, appears this statement:

It would appear that regulations of June 3, 1891, amended May 6, 1895, under which Dr. Jackson acted, are not in harmony with the opinion of March 21, 1896, *supra*, inasmuch as said regulations require that the board provided for "shall inquire into the title to the several private land claims held therein under Russian conveyances, and to fix and determine the proper metes and bounds of the same, as originally granted and claimed at the date of our acquisition of said Territory," while the opinion holds: "That Congress has not provided any method by which the extent or title of these claims can be determined."

The Commissioner of the General Land Office is in error as to the scope of departmental regulation 24, for it applies solely to private claims and the claims of the Greco-Russian church when asserted adversely to an application to enter lands for town-site purposes.

The departmental decision of March 21, 1896, was directed, as before stated, to the request of Bishop Nicholas on a former occasion to have a survey made of all the church lands in Alaska, and to affirm the right of ownership of the parishes to their lands in the same manner as it was given them by the Russian government at the time Alaska was

transferred to the government of the United States, and it was only in reply to these requests that it was said that,

Congress has not provided any method by which the extent or title of these claims can be determined, and until then, this Department can not pass upon them.

It follows, that so far as can be ascertained by the report of the Commissioner of the General Land Office, his decision of January 19, 1897, in suspending survey No. 59, for irregularity in shape, does not affect any claim of the Greco-Russian church, and that the departmental decision of March 21, 1896, as applied to the questions then before the Department, and as far as applicable to the facts presented now, is correct.

No commission can be appointed to survey and determine the boundaries of the church lands in Alaska, nor can any confirmation of existing church title be made, without further action by Congress.

If private parties have wrongfully encroached upon church lands and have ousted the church from the possession thereof, the Department has no authority or means of restoring the physical possession to the rightful owner, that being a matter exclusively within the jurisdiction of the courts.

Approved, December 11, 1897.

C. N. BLISS, *Secretary*.

PRACTICE—MOTION FOR REHEARING.

HALL v. MITCHELL.

A proposition to pay the costs of a rehearing, if one should be ordered, can not be considered in aid of a motion for a new trial.

A second motion for a rehearing based upon the same alleged newly discovered evidence, considered and passed upon in the disposition of a former motion for rehearing in the same case, should not be entertained.

Secretary Bliss to the Commissioner of the General Land Office, December 11, 1897. (C. J. W.)

W. N. Mitchell, on September 19, 1893, made homestead entry No. 277, for the NE. $\frac{1}{4}$ of Sec. 11, T. 21 N., R. 2 E., at Perry, Oklahoma. On September 27, 1893, Aurelius C. Hall filed affidavit of contest against said entry, alleging prior settlement. On the hearing the register and receiver found in favor of Mitchell. Your office, on appeal, reversed the local office and directed a division of the land between the parties, basing the decision upon doubt as to who was the first settler. From this decision the case came before the Department, on appeal by both parties, and on June 30, 1897, your office decision was reversed and the entry upheld. *Hall v. Mitchell*, 24 L. D., 584.

Hall filed separate motions—one for review of the last named decision, and one for rehearing, based on newly discovered evidence.

On September 27, 1897, the motion for review was denied. The plaintiff served copy of his motion and affidavits for new trial on defendant, and defendant replied by counter-affidavits. On examination this motion was denied. (See 25 L. D., 294.) The plaintiff has filed what he denominates a petition for the exercise of supervisory authority and for new trial. Said petition is substantially a second motion for rehearing, based upon the same alleged newly discovered evidence, which was the basis for the former motion.

An examination of the record of the former motion for rehearing on file in your office discloses the fact that the affidavits filed by plaintiff have been detached and withdrawn, and are now the predicate for a second motion. They are not re-filed in support of others filed for the first time, but are the sole affidavits filed in support of the pending petition. The only matter contained in said petition, not heretofore presented and considered, is the suggestion that plaintiff is willing, in order to obtain a rehearing, to be charged with the costs of the same, including a reasonable attorney's fee for defendant, and the further suggestion that the former motion was disposed of without due consideration.

In reference to the former motion, it may be proper to say that it was treated as a motion entertained, but denied on consideration. The record was re-examined in connection with the affidavits filed by plaintiff as newly discovered evidence, and the affidavits filed by defendant in response thereto. The conclusion reached was not inadvertent, but the legitimate outcome of the record facts as presented.

In reference to the proposition to pay the costs of a rehearing, if the Department should see proper to require the plaintiff to do so, it must be held that such proposition is not a legal or proper ground for rehearing. Where the right to such rehearing is shown to exist, it should be granted upon usual terms, and where proper and legal grounds are not shown, the motion should be denied without reference to costs.

A second motion for rehearing, based upon the same alleged newly discovered evidence, considered and passed upon in a former motion for rehearing in the same case, should not be entertained. The petition is accordingly denied.

PRACTICE—APPEAL—SECOND CONTEST—SETTLEMENT—CONTESTANT.

PRYOR ET AL. *v.* COUCH.

In computing the time within which an appeal must be filed the day of the service of the notice of decision must be excluded.

A second contest filed subject to a pending suit abates in the event of cancellation under the prior proceeding.

Presence within the Territory of Oklahoma (on railroad track adjacent to the land claimed) at the hour of opening disqualifies a settler who goes upon the land at such time.

The preferred right of a successful contestant should not be considered until such right is asserted by an application to make entry thereunder.

Secretary Bliss to the Commissioner of the General Land Office, December 11, 1897. (W. V. D.) (C. W. P.)

August 12, 1896, you transmitted the appeals of David C. Pryor, Hugh L. Ewing and John M. Couch from the decision of your office of January 28, 1896, in the case of David C. Pryor and others against John M. Couch, involving lots 1, 2, 3, 4, 7, 8, and 9, being fractional parts of the NE. $\frac{1}{4}$ of Sec. 9, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma Territory.

The record shows that, April 25, 1889, John M. Couch made homestead entry of the above described tracts: May 23, 1889, David C. Pryor filed an affidavit of contest against said entry, charging the entryman with premature and unlawful entry into the Territory, and asking that said entry may be canceled as to lots 8 and 9: June 18, 1889, Jerome Monk filed an affidavit of contest against said entry: July 18, 1889, James A. Robinson filed an affidavit of contest: July 25, 1889, James Thompson filed an affidavit of contest: July 27, 1889, Hugh L. Ewing filed an affidavit of contest, charging the entryman with having entered the Territory prior to twelve o'clock, noon, April 22, 1889, in violation of the President's proclamation: August 6, 1889, Joseph England filed an affidavit of contest, charging that Couch entered the Territory prior to twelve o'clock, noon, April 22, 1889, in violation of the President's proclamation of March 23, 1889, and that he was thereby disqualified to make entry, and alleging that he (England) settled upon lots 1, 2, 3, and 7 of said NE. $\frac{1}{4}$, on May 19, 1889, prior to any settlement or residence by the entryman. October 3, 1890, England filed a plea of intervention, and July 18, 1891, filed a disclaimer as to lots 8 and 9. The motion to intervene was overruled by the local officers, but their ruling was reversed by your office by letter, dated September 30, 1892, and it was held that to avoid a multiplicity of suits, England's motion to intervene should have been allowed, since he alleges a prior right to the land as the first legal settler, and the local officers were directed to order a hearing on his allegations, as intervener.

March 9, 1892, Pryor filed a "cross complaint" against Monk and Thompson, charging Monk with "soonerism," and that Thompson had not made settlement on the land, as alleged.

A hearing was had, and all the parties appeared, with the exception of Robinson, who made default.

February 20, 1895, the local officers rendered their decision, recommending that Couch's entry be canceled. Couch, Ewing, England and Monk appealed. Your office held that as Thompson did not initiate his contest within three months from the time he claimed to have made

settlement, his contest should be dismissed; that Ewing's contest was subject to the final determination of Pryor's, and when Pryor proved the allegations of his contest there was no further necessity for Ewing's contest, and that it died by operation of law; that England's settlement was good as against all the world, except only the entryman and the government. It was further held that Pryor was entitled to a preference right to lots 8 and 9, and Couch's entry was held for cancellation, subject to the superior rights of England as to lots 1, 2, 3, and 7, and the rights of Pryor as to lots 8 and 9. Pryor, Ewing and Couch have appealed from your judgment to the Department.

The attorney for the contestee has filed a motion to dismiss Ewing's appeal, on the ground that it was not filed within the time prescribed by the rules of practice. It appears, however, that the attorney for Ewing accepted service of the decision of your office May 7, 1896, when the time for filing an appeal began to run. But that day should be excluded in computing the time, and as the appeal was filed on July 6, 1896, it was filed within the time required by the rules of practice. *Dober v. Campbell et al.*, 17 L. D., 139; *McLeod v. La Rock*, 18 L. D., 137; *Shields v. McDonald, Id.*, 478. The motion to dismiss Ewing's appeal is therefore denied, and it will be disposed of on its merits.

The facts relative to Couch's presence in the Territory on the day of opening are not disputed. It is shown by the testimony in behalf of Pryor that at the hour of noon of April 22, 1889, Couch was on the track of the Santa Fe railroad, at a point ten or eleven miles from the nearest exterior line of the Territory, and where the railroad track crosses a corner of the land in controversy, and stepped from the railroad track upon said land. He was clearly disqualified to take a homestead in the Territory (*Smith v. Townsend*, 148 U.S., 490; *Hershey v. Bickford et al.*, 23 L. D., 522), and the contest of Pryor was properly sustained by your office.

Your action in dismissing the contest initiated by Ewing subsequently to Pryor's contest is clearly correct. *Curtin et al. v. Morton*, 22 L. D., 91; *Spencer v. Blevins et al.*, 12 L. D., 318.

Pryor, in his appeal, insists that your office decision was erroneous in consolidating the subsequent contest of England with his (Pryor's) contest, inasmuch as it appeared on the face of England's affidavit that he had no settlement claim to the land that would entitle him to be heard, as against the entry of Couch, upon his claim of settlement, and that said decision is erroneous in passing upon his (Pryor's) preference right as a successful contestant, at a time when there was no application pending to exercise such right.

The objection to your office decision that the question of Pryor's preference right of entry was not in issue and should not have been passed upon is well taken. That question should not be considered until a preference right is asserted by an application for the land, when the question as to whether Pryor has waived his right, except as to

lots 8 and 9, and also England's claim to lots 1, 2, 3 and 7, may properly be raised and determined. *Mundell et al. v. Lane*, 22 L. D., 22; *Betts v. Shumaker*, 21 L. D., 461; *Saunders v. Baldwin*, 9 L. D., 391; *Moore v. Lyon*, 4 L. D., 393.

With these modifications, the decision appealed from is affirmed.

PRIVATE LAND CLAIM—SURVEY
HEIRS OF NICHOLAS RODRIGUEZ.

An application for the survey of lands alleged to be embraced within a Spanish grant must be denied, where it appears from the record that the official survey of said grant, on which patent issued, was made after due notice to the parties interested, apparently followed the lines fixed by the Spanish authorities, and was acquiesced in for a long term of years.

Secretary Bliss to the Commissioner of the General Land Office, December 11, 1897. (E. F. B.)

Frederick T. Laird claiming to represent the heirs of Nicholas Rodriguez filed on October 21, 1896, with the United States surveyor general at Tallahassee, Florida, an application for survey of an alleged unsurveyed Spanish concession embracing land situated on Anastasia Island, Florida, in township 7 south, range 30 east. The application was rejected by the surveyor general and your office on May 6, 1897, affirmed this action, from which decision Laird appealed.

The facts in relation to this claim which control the decision of the Department must be found in the reports of the board of land commissioners, and of the register and receiver of the district of East Florida acting as commissioners under the 4th section of the act of Congress of February 8, 1827, (4 Stat., 202), and of the subsequent action upon this claim by Congress and the Executive Department.

From an examination of these sources it appears that the concession to Lorenzo Rodriguez was made by Quesada, military governor of Florida in February, 1793—and was surveyed by John Travers September 16, 1804, for Lorenzo Rodriguez.

The surveyor general of Florida submits with his report upon the rejection of this application the following translation of the return of said survey.

Don Lorenzo Rodriguez—By virtue of the commission which has been conferred on me by his Excellency Don Henry White political and military governor of this province, etc.

I certify that I have measured and delineated to Don Lorenzo Rodriguez a piece of land which contains a hundred acres situated in the island of Saint Anastasia, contiguous on the south with the high road which leads to the tower, on the east with the quarry where stones are dug, north with the shore and west with the sacatal (a place where grass grows). Whose space and demarkations are those which the preceding plan denotes and wherefore I attest it in St. Augustine, Florida, September 16, 1804.

Jno. Travers.

The claim of Lorenzo Rodriguez was presented to the board of land commissioners on November 24, 1823, by Nicholas Rodriguez as shown by the following extract from the minutes of the board.

Nicholas Rodriguez presented his memorial to this board, praying confirmation of title to one hundred acres of land lying on St. Anastasia island, with a certificate by the notary of the government, stating that memorialist came into possession of said lands as one of the heirs of his deceased father, Lorenzo Rodriguez, and dated the 26th of February, 1817; also, a certified copy of royal title to Lorenzo Rodriguez, by Governor White, dated the 9th of January, 1805; which are ordered to be filed.

American State Papers—D. G. Ed. Vol. 3—677.

On June 21, 1824, Nicholas Rodriguez was permitted by the board to withdraw his claim for 100 acres on St. Anastasia Island, for the purpose of amending the memorial thereof. American State Papers—Vol. 4—261.

The minutes show that the case of Rodriguez was next called on September 10, 1824, and not being prepared for trial was continued—(Vol. 4—268) but on the next day (September 11,) the case was taken up and confirmed as shown by the following extract from the minutes of the board. "Gabriel W. Perpall for 335 acres—Mariano Berta for 166 acres; same for 200 acres—Nicholas Rodriguez 300 acres" which were confirmed. American State Papers—Vol. 4—268.

The minutes of September 30, 1824, show the following action to have been taken in this case—

On motion of the United States Attorney the case of Nicholas Rodriguez for 300 acres of land, was opened, and ordered to stand over for further investigation. American State Papers—Vol. 4—270.

There is no record of any other action on the case by the old board of land commissioners, so far as it appears from the American State Papers—but after the act of February 8, 1827, making it the duty of the register and receiver of the district of East Florida, to examine and decide all claims and titles to lands in East Florida not theretofore decided by the former board of commissioners, sixteen cases which were omitted from the abstracts of the old board of commissioners, which included the claim of Nicholas Rodriguez, were sent back from the General Land Office to the register and receiver for their report.

On January 29, 1829, they submitted a report of their action on private land claims in said district, in which was included Abstract No. 15—of sixteen cases sent back from Washington to the register and receiver for their report embracing the claim of Nicholas Rodriguez. Upon this claim they report as follows:

Quesada conceded this land to Lorenzo Rodriguez, in February, 1793. On the death of Lorenzo, Nicholas, the son, became the purchaser; and the petition and sale of Lorenzo was confirmed by an official act of the Spanish government, on the 18th September 1816. The land was confirmed to the present claimant, by the board of land commissioners, on the 11th September, 1824. It is situated on Anastasia island, at a place called Buenavista, and on a creek called Cano de la Escelta, near the light-house.

American State Papers—Vol. 5—420.

The register and receiver did not pretend to examine into the claim

or to render any decision thereon as to whether it should or should not be confirmed, but they merely reported it as having been confirmed by the board of land commissioners on September 11, 1824, and omitted from their abstracts—although the minutes of that board show that on September 30, thereafter, said case was on motion of the United States Attorney opened and ordered to stand over for further investigation and that no action was afterward taken in said case until submitted to Congress by the report above referred to.

If the foregoing abstracts from the minutes of the board of land commissioners show all action taken by the board on said case it would seem that it was inadvertently submitted to Congress for its action. However, Congress by the act of May 26, 1830, (4 Stat., 405) took action upon this report and by the first section of said act provided:

That all the claims and titles to land filed before the register and receiver of the land office, acting as commissioners, in the district of East Florida, under the quantity contained in one league square, which have been decided and recommended for confirmation, contained in the reports, abstracts and opinions, of said register and receiver, transmitted to the Secretary of the Treasury, according to law, and referred by him to Congress, on the fourteenth day of January, one thousand eight hundred and thirty, be, and the same are hereby confirmed, etc.

Whatever may be the area of this claim, it is certain there was but one concession to Lorenzo Rodriguez and that was the concession made to him by Quesada in February, 1793, which was surveyed by Travers for Lorenzo Rodriguez September 16, 1804, and which after his death passed into the possession and control of Nicholas Rodriguez by purchase, and was confirmed to him September 18, 1816.

When the claim was presented to the board of land commissioners it had been surveyed, and the surveyor certified that he had "measured and delineated" to Rodriguez, a piece of land which contains one hundred acres situated on Anastasia island, giving such definite boundaries that any error in the survey, should have been detected. No reason is apparent why the petition or memorial of claimant was changed from one hundred acres to three hundred. At all events it does not appear that it was the intention to apply for confirmation of any other concession than that made by Quesada in 1793, and surveyed by Travers in 1804. It may have been known that there was a greater quantity within the limits of the Travers survey than one hundred acres and that the amendment as to quantity was made as a precaution to cover the full area within the lines of the survey.

Nicholas Rodriguez in presenting his memorial to the board for confirmation of title to one hundred acres of land in Anastasia island, exhibited with it "a certified copy of a royal title to Lorenzo Rodriguez by Governor White dated the 9th of January 1805."

The records show that the royal title which was issued by Governor White to Rodriguez was for the land surveyed, and that the survey was made to delineate and mark the boundaries of the concession made to Rodriguez by Quesada in 1793, as the surveyor states in his returns

that it was made "by virtue of the commission which has been conferred on me by his Excellency, Don Henry White, political and military governor of this province, etc."

Upon this theory the board of commissioners, had no authority to confirm to Rodriguez any other land than that embraced within the limits of the survey, whatever may have been the true quantity within the boundaries as surveyed. If the royal title issued for the lands as delineated and marked by the survey, the grantee would be entitled to all lands within the boundaries as platted and returned by the surveyor, whether the quantity was greater or less than that computed by him, and it cannot be assumed that a recommendation for confirmation of a greater quantity than that embraced within the limits of the actual survey upon which the royal title issued would entitle the claimant to any other greater quantity of land.

On the 27th of March, 1837, shortly after the act of Congress confirming this grant, Maria R. Rodriguez, the widow of Nicholas Rodriguez to whom the property was devised, sold it to Elias B. Gould and described it in the deed as follows:

All that tract or parcel of land situated in the north west end of Anastasia island and directly in front of the city of St. Augustine consisting of *one hundred acres*—more or less, being the *same land* that is described in a concession from the Spanish government to Lorenzo Rodriguez on the 16th day of February, 1793, and which was surveyed by John Travers in 1804, by order of the Spanish government and at that time confirmed by royal title by Governor White.

The significance of this admission is that it corroborates the statement that the concession by Quesada in 1793, was the same land, that was surveyed by Travers in 1804, upon which the royal title issued and that it was the land confirmed to Rodriguez as there is no evidence whatever of any other grant to him.

This claim was surveyed in 1850, by Deputy Surveyor A. M. Randolph, who was instructed to circulate as extensively as practical notice of his contemplated surveys, and that

when any of those claims are based upon Spanish surveys which may be confirmed to the full extent by act of Congress or surveys confirmed by final decrees of court, you will locate them with strict conformity to those surveys.

There is no evidence whatever, except the uncorroborated statement of applicant's attorney that his survey was not made in full compliance with his instructions or that the lines of the Travers survey were not followed and retraced. The mere fact that his computation of the area showed it to contain 126.40 acres, does not impeach the correctness of his survey, because as stated by the surveyor general in his report, usually the United States surveys differ in acreage from the Spanish surveys, and sometimes much greater than in this case.

The claim now asserted for the first time that this concession was for 300 acres "distinguished in Spanish lines in two parts," of which one portion was surveyed upon which the royal title issued and that title

to the remaining portion had been deferred for uses and occasions detailed in the Spanish archives is not supported by the record.

On April 14, 1894, a patent issued in conformity to the Randolph survey, upon the application of the attorney for claimants in this application and no question was then raised as to the correctness of that survey. The reasons for the rejection of this application are presented with great force in the closing paragraphs of the report of the surveyor-general of Florida, in which he says:

This claim was surveyed forty-six years ago, and for that length of time the survey has been acquiesced in by all parties, the record appears to show that all parties interested had due notice of the survey being made, and in the absence of proof to the contrary it would appear that the survey was satisfactory to the interested parties who were contemporary with the survey, and patent for said claim issued April 14, 1894.

A great many of the statements of the applicant are disproved by the record, other statements are not verified, and consequently his deductions therefrom are either erroneous or of no effect in disproving the record; and do not show sufficient reasons for a new survey of this concession.

This claim has been fully satisfied by the patent issued April 14, 1894, and your decision affirming the action of the surveyor general rejecting this application is affirmed.

MINING CLAIM—PROTEST—ADVERSE—CO-OWNER.

THOMAS ET AL. v. ELLING.

If the protest filed against a mineral application, does not present such a claim as is contemplated by the statute, it should not be treated as an adverse; and the fact that suit thereon has been commenced in the courts will not require the Land Department to recognize the claim as an adverse within the meaning of the law.

A protest based on alleged co-ownership is not an adverse claim that requires the institution of judicial proceedings in a court of competent jurisdiction; but the Land Department may await the result of proceedings so begun in such a case before giving further consideration to the protest.

The cases of Grampian Lode, 1 L. D., 544; Lucy B. Hussey Lode, 5 L. D., 93; Monitor Lode, 18 L. D., 358, overruled.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 13, 1897. (F. W. C.)

It appears that Henry Elling made application for patent for the Spratt lode mining claim, survey No. 4766, Helena, Montana, land district, on February 29, 1896, and during the period of publication William H. Thomas and the Lillian Mining Company filed a protest and adverse, alleging conflict with the Bullion lode. On the same day Thomas, for himself, the Lillian Mining Company and Minnie Spratt, minor heir of James G. Spratt, filed protest and alleged adverse, stating that they

are the owners of and entitled to the possession of an undivided one-half interest in and to the Spratt lode mining claim, described in said application.

The receiver of the local office, under date of April 23, 1896, reports that:

Subsequently, W. A. Clark, Esq., counsel for Henry Elling, the mineral applicant, forwarded to this office a motion to dismiss the aforesaid adverse claims, for various reasons set out in the motion filed by him. These papers were received in this office March 20, 1896, and instead of rejecting the motion formally the papers were returned to Mr. Clark by the register, with the statement that the adverse claims having been filed, the same could not now be dismissed, but that the question of ownership of the ground involved must be settled in the courts. From this action the mineral applicant appeals.

On March 31, 1897, there were filed certificates of the clerk of the district court, showing that suit had been brought on each of the alleged adverse claims so filed.

Your office, by letter of June 15, 1896, affirmed the action of the local office, and in passing on the question said:

I do not deem it expedient to discuss the numerous points of error suggested by counsel in support of the appeal.

Adverse claims having been filed and suits thereon instituted as would appear within the period prescribed by law, and there is in the record nothing to contradict this conclusion, the Department has lost jurisdiction, and no further steps can be taken until the suits in court have been terminated and proper evidence thereof filed. 2 L. D., 704; 11 L. D., 391.

The mineral claimant prosecutes this appeal, assigning error as follows:

I. It was error to hold that the affidavit filed in the local office by Thomas *et al.*, was an adverse claim within the meaning and intent of Section 2326, U. S. Revised Statutes.

II. It was error to hold that the mere fact that suit had been instituted based upon the allegations made in said affidavit filed by Thomas *et al.* deprives the Land Department of jurisdiction to dismiss said affidavit from consideration as an adverse claim, when in fact said affidavit lacks every essential required of an adverse claim.

III. Error on the part of the Commissioner in ignoring and flatly refusing to follow the statement of law made by the supreme court of the United States in the case of *Turner v. Sawyer*, 150 U. S., 578, and in proceeding to decide this matter in disregard thereof.

Notwithstanding the local office and your office seem to have treated the motion to dismiss the protest and adverse as though addressed to both, yet no question as to the Bullion adverse, as I understand it, is raised by either of the appeals, and the sole issue is as to the one filed by Spratt *et al.*, wherein it is alleged that the protestants own an undivided half interest in the Spratt lode.

The statute referred to, so far as applicable to the question at issue, reads as follows:

Sec. 2326. Where an adverse claim is filed during the period of publication, it shall be upon the oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a

court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure to so do shall be a waiver of his adverse claim.

Where an adverse claim, *such as is contemplated by the statute*, is filed and suit is instituted thereon in accordance with the terms of section 2326, R. S., the proceedings upon the mineral application are stayed or suspended during the pendency of that suit. If the protest so filed does not present such a claim as is contemplated by the statute, it should not be treated as an adverse, and the fact that suit has been commenced thereon in a court, does not require the Land Department to recognize the claim as an adverse within the meaning of the statute.

The Department does not understand that a different ruling from this has heretofore prevailed; certainly not to any considerable extent. Generally speaking, the cases wherein the doctrine stated by your office has been announced, were cases where proper adverse claims had been filed. This is especially true of the cases cited in your office decision.

But the contention here is that the protest in question, which simply alleges ownership by the protestants of an undivided interest in the lode claim applied for, is not such an adverse claim, within the meaning of the statute, as operated to suspend proceedings in the Department. The abstract of title of the Spratt lode, filed with the application for patent, would, in the absence of any showing to the contrary, seem to show full title in the applicant, Elling; but the protest, filed as an adverse, alleges a joint ownership of that lode by the protestants and Elling,

and that several of the instruments appearing of record in the county recorder's office of said Madison county, State of Montana, and shown in part on the abstract of title hereto attached, and purporting to demonstrate that Henry Elling is the sole owner of the said Spratt lode mining claim, are wrong, and willful misrepresentations, and are of no force or effect.

If Elling be not the sole owner, it follows that he is not entitled to patent in his individual name.

The Department has heretofore held that "a co-owner objecting to the issue of a patent must protect his rights under the form of procedure provided for an adverse claimant." (Lucy B. Hussey Lode, 5 L. D., 93; Grampian Lode, 1 id., 544; Monitor Lode, 18 id., 358); but it is now insisted that this rule of the Department has been reversed by the supreme court in *Turner v. Sawyer* (150 U. S., 578). This was an action brought by Sawyer—a co-owner—against *Turner et al.*, to have Turner declared the trustee of Sawyer of an interest in the "Wallace Lode," which had been patented to Turner. The interest of Sawyer grew out of proceedings somewhat similar to those in the case at bar, so far as action was had under Sec. 2324. On page 586, the court say:

It is contended, however, that Sawyer is precluded from maintaining this bill by the fact that he filed no adverse claim to the lode in question under Rev. Stat., 2325.

This section declares that "if no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication" of notice of application for patent, "it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter." By 2326, "where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim," etc. In this case there was no conflict between different locators of the same land, and no contest with regard to boundaries or extent of claim, such as seems to be contemplated in these provisions. Turner did not claim a prior location of the same lode, and made no objection to the boundaries or extent of Sawyer's claim, but asserted that he had acquired Sawyer's title by legal proceedings. The propriety of such claim was not a question which seems to have been contemplated in requiring the "adversing" of hostile claims.

It is clearly apparent that the court has here announced a doctrine that is the reverse of that heretofore held by the Department. The ruling of the court is binding upon and must become the ruling of the Department.

It follows, therefore, that the protest in question is not such a one as can be recognized as an adverse claim necessitating the institution of proceedings thereon, in a court of competent jurisdiction. It is the duty of the Land Department, excepting in controversies referred to the courts by the statute, to determine *before issuance of patent* whether the applicant is entitled thereto, and the fact that such controversies may be litigated in the courts *after issuance of patent* does not relieve the Department of its duty in the premises. Where the matter has already been decided by a court of competent jurisdiction the question may arise whether such a decision is conclusive upon the Department, but without deciding that question it seems clear that where the dispute does not involve the character of the land, or the qualifications of the entryman, or his compliance with the law under which title is sought, the Department may properly accept and follow the judgment of a court of competent jurisdiction, determining as between contending parties their respective rights to, and interests in, the land in controversy. The Department is not required to await the bringing of suit, because it is not so provided in the statute and because there is no obligation upon either party to invoke the jurisdiction of a court as there is in the instance of an adverse claim. Here suit has been instituted in the local court for the purpose of settling the question of joint ownership. Jurisdiction of the subject matter may exist even though not recognized by sections 2325 and 2326. The Land Department may therefore well await the result of that suit before giving further consideration to the protest.

The said Grampian Lode, Lucy B. Hussey Lode, Monitor Lode and all other cases in conflict herewith are therefore overruled.

LABATHE *v.* ROBORDS.

Motion for review of departmental decision of September 3, 1897, 25 L. D., 207, denied by Secretary Bliss, December 13, 1897.

JURISDICTION—SUPERVISORY AUTHORITY.

UNION PACIFIC R. R. CO. ET AL. *v.* STEWART ET AL.

The Land Department may on its own motion, for the protection of apparent equities, and after due notice to all parties, reopen an adjudicated case for further consideration, where the land involved appears vacant on the records.

Secretary Bliss to the Commissioner of the General Land Office, December 13, 1897. (F. W. C.)
(W. V. D.)

I am in receipt of your office letter "F" of November 19, 1897, calling attention to departmental decision of April 12, 1892 (not reported), in the matter of the case of the Central Branch of the Union Pacific Railroad Company and Arnold Parli *v.* John B. Stewart, Mathew H. Wymore and The St. Joseph and Denver City Railway Company, involving the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 1 N., R. 11 E., Lincoln land district, Nebraska.

This tract, it appears, is within the limits of the grant made by the act of July 2, 1864 (13 Stat., 356), for the Central Branch of the Union Pacific Railroad, as shown by the map of definite location filed on March 6, 1866. It is also within the limits of the grant made by the act of July 23, 1866 (14 Stat., 210), for the St. Joseph and Denver City Railway Company, as shown by the map of definite location filed March 28, 1870.

The case as before considered by this Department arose upon the offer of proof by John B. Stewart upon his homestead entry made August 6, 1887, covering this land.

Mathew H. Wymore had, on September 16, 1887, tendered a homestead application for this tract, which was rejected by the local officers; from which action he duly appealed.

On February 21, 1888, Arnold Parli, claiming to have purchased the land from the Central Branch of the Union Pacific Railroad Company, applied to purchase the tract under the provisions of section five of the act of March 3, 1887 (24 Stat., 556).

Upon the consideration of the claims of the several parties and the grantee companies, your office decision of November 20, 1890, rejected the claim of the Central Branch of the Union Pacific Railroad Company, held the entry by Stewart for cancellation, rejected the applications of Wymore and Parli, and held that the tract inured to the St. Joseph and Denver City Railway Company under its grant. From said decision the Central Branch of the Union Pacific Railroad Company, Parli, Stewart and Wymore all appealed to this Department.

The record as presented shows that one Samuel Snooks made homestead entry of this tract on January 16, 1865, which entry was canceled on October 23, 1866.

At the time of the consideration of this case before by the Department, to wit, April 12, 1892, it was the accepted rule of adjustment that the condition of the land at the date of definite location alone determined the company's rights under its grant, without regard to its condition at the date of the passage of the act making the grant; so that your office decision was affirmed because the tract in question appeared to have been free from claim at the date of the filing of the map of definite location by the St. Joseph and Denver City Railway Company. It was noted, however, that on February 16, 1885, Parli purchased this tract from the Central Branch of the Union Pacific Railroad Company, believing the tract to be covered by said grant. This was two years before the tender of the homestead applications by Stewart or Wymore, and it was therefore held that:

Parli, if a citizen of the United States, or if his intention had been declared to become a citizen, would be in a position to be entitled to purchase the tract under said section 5, were it not for the fact that at the time of his application to purchase, the Government did not own the tract, in fact it has had no title thereto since March 28, 1870, when the line of St. Joseph and Denver City Railroad was definitely located.

Your letter of November 19, 1897, calls attention to the decision of the supreme court in the case of *Bardon v. Northern Pacific Railroad Company* (145 U. S., 535), decided May 16, 1892, subsequent to the decision of the Department in the case under consideration, in which it was held:

The grant is of alternate sections of public land, and by public land, as it has long been settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, do not fall within the designation of public land. The statute also says that whenever, prior to the definite location of the route of the road, and of course prior to the grant made, any of the lands which would otherwise fall within it have been granted, sold, reserved, occupied by homestead settlers, or pre-empted or otherwise disposed of, other lands are to be selected in lieu thereof under the direction of the Secretary of the Interior. There would therefore be no question that the pre-emption entry by the heirs of Robinson, the payment of the sums due to the government having been made, as the law allowed, by them after his death, took the land from the operation of the subsequent grant to the Northern Pacific Railroad Company, if the pre-emption entry had not been subsequently canceled. But such cancellation had not been made when the act of Congress granting land to the Northern Pacific Railroad Company was passed; it was made more than a year afterwards. As the land pre-empted then stood on the records of the Land Department, it was severed from the mass of the public lands, and the subsequent cancellation of the pre-emption entry did not restore it to the public domain so as to bring it under the operation of previous legislation, which applied at the time to land then public. The cancellation only brought it within the category of public land in reference to future legislation. This, as we think, has long been the settled doctrine of this court.

Said letter states that the case under consideration has been duly closed and that no action has been taken by any of the parties in interest

looking to the re-opening of the same, but as several parties, strangers to the record, have inquired of your office as to the status of said tract, which now appears vacant upon the records, in view of Parli's equities you request such instructions as the Department "may deem suitable to the occasion."

It would appear, in view of the decision of the court referred to, that the tract in question was excepted from the grant for the St. Joseph and Denver City Railway Company, and so far as the record before me shows there would appear now to be no objection to allowing the application to purchase made by Parli. The parties are none of them; however, before the Department, and in order that the matter may be duly presented and all parties be given an opportunity to make a showing in support of their claimed interests, you are instructed to re-transmit the record in this case with such recommendation thereon as you deem proper in view of the decision referred to, and that all parties be duly notified thereof and advised that the case will await action by the Department for a period of sixty days, during which time they may make any showing desired. At the expiration of that time the matter will be taken up for re-adjudication, in the light of the decision of the court, under the provisions of the act of March 3, 1887, *supra*.

NORTHERN PACIFIC R. R. CO.

Application for the suspension of action looking to the disposal of lands listed and selected on account of the Northern Pacific grant, east of the terminus established by the departmental decision of April 27, 1896, 23 L. D., 204, denied by Secretary Bliss, December 13, 1897.

TIMBER CULTURE ENTRY—EQUITABLE ACTION—ADVERSE CLAIM.

MILNE *v.* THOMPSON.

Failure to submit final proof on a timber culture entry, within the statutory period, is no bar to the equitable confirmation of the entry, if the delay is satisfactorily explained; and such right is not defeated by an intervening contest based only on the default of the entryman in the matter of making final proof.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 13, 1897. (C. J. G.)

On December 21, 1881, Andrew Thompson made timber culture entry for the NW. $\frac{1}{4}$ of Sec. 22, T. 112 N., R. 67 W., Huron land district, South Dakota.

On July 2, 1895, Una H. Milne filed an affidavit of contest against Thompson, alleging that he had failed to submit final proof within thirteen years from the date of his entry. On the following day Thompson was personally served with notice that a hearing would be had September 5, 1895.

On September 3, 1895, Thompson offered his final proof which was rejected by the local officers because a contest was pending and the proof was made before the hearing was had.

On September 30, 1895, the hearing having been had at the appointed time with both parties present, the local officers rendered decision in which they recommended the cancellation of Thompson's entry for failure to submit final proof within thirteen years as alleged.

On October 4, 1895, Thompson appealed from the rejection by the local officers of his final proof, and on November 5, 1895, from their decision recommending the cancellation of his entry.

On April 2, 1896, your office, in passing upon both appeals, affirmed the action of the local officers as to the rejection of Thompson's final proof, but reversed their action as to the cancellation of his entry. The contestant has now appealed from your said office decision to this Department.

Your office found that Thompson had not offered his final proof within thirteen years from the date of his entry, but held that under the decision in the case of *Pattin v. Smith* (21 L. D., 315) he had not thereby forfeited his right to the land. The syllabus of that case is as follows:

A charge of failure to submit final proof under a timber culture entry within the statutory life of the entry, must fail where it appears that under the extension of time authorized by the act of May 20, 1876, the entryman is not in default.

It appears that Thompson made applications during the years of 1884, 1885, 1886 and 1887, for extension of time, alleging compliance with law in the matters of planting and cultivation but that by reason of destruction by drouth, hail and prairie dogs he was unable to secure the growth of the required number of trees. It does not appear whether these applications were allowed or rejected. It was the opinion of your office, however, that as they were placed on record by the local officers, and as the record does not show that they were refused, it will be presumed that they were allowed. Hence your office held that the four years of extension allowed would give Thompson, under the case cited, until December 1898, to make his final proof.

The first section of the act of May 20, 1876, (19 Stat., 54) provided that—

The time allowed by this act in which to plant the trees *and make final proof* shall be extended the same number of years as the trees planted on said claim were destroyed in the manner specified in this section.

It is thus seen that the above act provided for an extension of time within which to make final proof as well as to replant the trees. As Smith's entry, in the case cited by your office, was made in the year 1875, he was entitled to the provision of said act. But the act of June 14, 1878, (20 Stat., 113), under which Thompson made his entry and which repealed all acts and parts of acts in conflict therewith, contains no provision for an extension of time beyond the statutory period within which to submit final proof. Hence the case cited is not appli-

cable to the one now under consideration. This conclusion is in harmony with the decision in the case of *Morris Collar* (13 L. D., 339) and other cases, wherein it was held (syllabus)—

The timber culture act does not contemplate an extension of the statutory period within which final proof is required but proof submitted after the expiration of said period, either under the act of 1878, or the commutation clause of section 1, act of March 3, 1891, will receive due consideration.

Section 2457 of the Revised Statutes defines the circumstances under which entries may be submitted to the board of equitable adjudication, as follows:

Where the law has been substantially complied with, and the error or irregularity arose from ignorance, accident, or mistake, which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

See also Rule 33 of circular of April 10, 1890, (10 L. D., 503).

Thus failure to submit final proof within the statutory period is no bar to the equitable confirmation of a timber culture entry where the delay is satisfactorily explained; and this notwithstanding an intervening contest alleging only such failure. *Timpson v. Longnecker* (22 L. D., 59).

Thompson's final proof shows that he complied in good faith with the terms of the timber culture law, and any failure to secure the requisite growth of trees was due to their destruction by drouth, hail and prairie dogs, as previously set out herein. The contest affidavit contains no allegation of bad faith in the matters of planting and cultivation, it being directed solely to Thompson's failure to offer his final proof within thirteen years; information which was already a matter of record in the local office. In explanation of his said failure Thompson states that he construed the several extensions granted him to have the effect of extending his time beyond the thirteen years; that he was never notified that the time for making his final proof had expired; and that immediately upon ascertaining the fact he offered his said proof, which was rejected only because of the pending contest.

From the fact that Thompson applied for extensions of time, thereby evidencing a purpose to meet the requirements of the timber culture law, taken in connection with his statements as above set out, it is deemed that his failure to submit final proof within the statutory period has been satisfactorily explained.

The conclusion reached herein is in harmony with the opinions expressed in the desert land cases of *Phillips v. Almy* (17 L. D., 255), and *Thompson v. Bartholet* (18 L. D., 96).

Your said office decision, as herein modified, is accordingly affirmed, the contest dismissed, and the proof if otherwise satisfactory will be accepted and the case referred to the board of equitable adjudication.

SWAYZE *v.* SUPRENANT.

Petition for re-review in the case above entitled denied by Secretary Bliss, December 13, 1897. See 24 L. D., 337; *id.*, 580.

OKLAHOMA LANDS—QUALIFICATIONS OF SETTLER.

ATKINSON ET AL. *v.* SYKES.

The prohibitive provisions in the act of March 3, 1893, with respect to the Cherokee strip, were enacted at a time when the similar provisions in the act of March 2, 1889, were liberally construed by the Department, and when the question of "advantage gained" by presence in the Territory during the prohibited period was regarded as a proper one for consideration in determining the qualifications of a settler in Oklahoma.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 16, 1897. (G. C. R.)

This is a petition for re-review, filed by Jamin W. Smith, and involves the NW. $\frac{1}{4}$ of Sec. 12, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma.

The facts are fully stated in the decision of the Department, dated March 24, 1897 (352 L. and R., 161), and need not here be repeated. In that decision the land was awarded to William H. Atkinson, and directions were given that the entry thereof, made by Benjamin G. Sykes, be canceled, because he had entered the Territory during the prohibited period; it was further found that Atkinson was the prior settler on the land; that while he had entered another tract, his mistake was the result of misinformation given him by Sykes, and he was allowed to amend his entry in accordance with his application therefor.

A motion for review of said decision was denied August 21, 1897 (25 L. D., 143). That motion while alleging ten errors, practically raised but two questions, namely:

1. That it was error not to have held Atkinson disqualified, because of his presence in the Territory during part of the prohibited period.
2. That it was error not to have awarded the preference right to Smith.

These questions were considered in the decision on review.

This petition for re-review, for the second time, and under sundry heads, raises the question of Atkinson's qualifications.

In this connection, the present petition contains a statement which is erroneous and misleading. It is said:—

In section 14 of the act of March 2, 1889, is contained a sooner clause regarding the Cherokee Strip. In section 13 of the same act is the same provision concerning the Oklahoma country. Up to about 1894 the clause in section 13 was strictly construed by the Department of the Interior. In 1893, March 3, the provisions in sections 13 and 14 were re-enacted in reference to the Cherokee Strip. If the construction put

upon the "sooner" clause in section 13 by the Honorable Secretary was incorrect, why did Congress re-enact the clause in the Strip bill without an effort to make the intent of Congress clear? The fact that Congress did not change the language in any way, but re-enacted, in the exact language, the provision time and again construed by the Department, demonstrates that the Secretary's interpretation was correct.

As a matter of fact, the decisions of the Department upon the "sooner" question, commencing with that in the case of *Kingfisher v. Wood et al.*, rendered December 1, 1890 (11 L. D., 330), down to October 17, 1893, when decision was rendered in the case of *Turner v. Cartwright* (17 L. D., 414), were exactly the reverse of what the petitioner states them to have been; that is, they made the disqualification resulting from presence in the territory during the prohibited period depend upon the obtaining of an advantage which would, if recognized, destroy the equality in opportunity contemplated by the law.

Commencing with the case of *Turner v. Cartwright* (*supra*), a stricter construction of the "sooner" clause of the act prevailed, until, in the case of *Curnutt v. Jones* (21 L. D., 40), the Department went back to the more liberal rulings of Mr. Secretary Noble.

It will be seen that the statements of the petitioner are not sustained by reference to past departmental decisions. It was while a *liberal* construction was given to the "sooner" clause—from October 1, 1890, to October 17, 1893—that Congress, on March 3, 1893, re-enacted, in its legislation relating to the Cherokee Strip, the provisions of sections 13 and 14 of the act of March 2, 1889; hence the argument of petitioner regarding the alleged tacit endorsement of departmental rulings by Congress, is against his position, and not in his favor.

The testimony as to Atkinson's qualifications was discussed in the original decision; the facts were fully given, and cases cited, showing that he was not disqualified.

The petition further contends that the departmental decisions heretofore rendered have been erroneous in not finding that Sykes was the first settler.

It has been held from the first that Sykes entered the Territory in advance of the opening, and thereby gained an advantage over others. It makes, therefore, no difference whether he was the first settler or not—although even that finding has been against him.

The petition is denied; and is herewith returned for the files of your office.

MINERAL LAND—SECOND HEARING—CERTIORARI.

TOWN OF ALDRIDGE v. CRAIG.

A determination that a tract of land is mineral in character will not prevent a subsequent hearing, involving the same question, where a change in the character of the land is alleged, but the showing in such a case must be clear and convincing to warrant such a hearing.

A general charge that an entry is not made for the benefit of the entryman will not justify a hearing, if the facts on which such allegation rests are not specifically set forth, and the sources of information disclosed.

The fact that a party litigant pays the expenses of a witness, and for the loss of his time in attending the trial, does not necessarily indicate fraud or moral turpitude.

The Department will not interfere with the exercise of the Commissioner's discretion, in refusing to order a hearing, unless there is such an abuse of discretion as would work an injustice, or an inequitable denial of a legal right.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 16, 1897. (H. G.)

Edward Howell, P. Dougherty and others, inhabitants of the town of Aldridge, in the State of Montana, petition for the writ of certiorari to direct your office to transmit the papers and the record in the above entitled case to this Department, as upon appeal.

This petition discloses the existence of the following facts appearing of record in your office:

The official plat of survey of township 8 south, range 7 east, in the Bozeman, Montana, land district, was filed in the local office in April, 1894.

On October 11, 1894, Jane Craig made coal declaratory statement No. 400, in such local office, for the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 36, in said township 8 south, range 7 east, and thereafter, on October 11, 1895, she was permitted to make coal entry (No. 59) covering said tract.

Thereupon, the State of Montana, by its Attorney-General, protested against the issuing of a patent therefor, in substance alleging that the tract, in common with the other lands embraced in said said section 36, was granted to the State by the enabling act, under which Montana was admitted into the Union; that the land was more valuable for agricultural and townsite purposes, than for the purposes of mining coal therefrom; that coal could not be mined, worked or obtained therefrom at any profit, and that coal did not exist in sufficient quantities to add to the value of the tract, or to justify the expenditure of money for its exploration; that the entryman had not, either personally or by her agents, expended any money in working or exploiting the land for coal or mineral, and that she had not at the time of making her declaratory statement found any mineral thereon, or opened any vein of coal; and that at the time of the admission of the State into the Union the existence of coal on any portion of said land, sufficient to justify the expenditure of money in working the same for coal, was not known.

A hearing was ordered by your office upon this protest, and was had before the local office. Upon consideration of the testimony submitted thereat, the local office found in favor of the claimant, Jane Craig, and, on July 3, 1896, your office affirmed this decision and dismissed the contest, subject to the right of appeal. No appeal was taken by the State

of Montana, and your office, on March 6, 1897, announced that such decision had become final, and the coal entry of Jane Craig was approved for patent.

The affidavits, filed in March and April, 1897, embody the grounds of protest, and set forth the following facts, substantially:

The town of Aldridge is unincorporated. With the exception of seven buildings, it is situate on the tract entered as coal land by Jane Craig, contains one hundred and eighty buildings, one hundred and sixty-seven of which are occupied as dwellings and the others for business purposes, and has a population of about five hundred. At the time of the coal entry, two hundred employes of a coal company, operating on an adjoining section, and their families were living in such town. At the time of the entry, on October 11, 1895, the character of the land had wholly changed and then had no value for coal, but was valuable only for townsite purposes. Efforts had been made to obtain coal in sufficient quantities to warrant the continued development of the mines on the tract, but were abandoned prior to entry. Jane Craig did not enter the land for her own benefit, but for the use and benefit of others, who furnished the money for the payment of the lands and to defend the contest between her and the State of Montana. Immediately after the contest was closed, the entryman parted with her title to the tract to those who had paid for the land and defended the contest, having theretofore executed and delivered to such parties a bond for a deed. Other affidavits are to the effect that the alleged grantees of Mrs. Craig had promised one party a life lease for a portion of lands on the tract and certain privileges as compensation for his services as a witness in the contest.

On May 22, 1897, your office refused to order a hearing on said protest, and, on July 28, 1897, overruled a motion for review of said decision.

On August 25, 1897, the protestants filed their appeal to this Department, and on October 11, 1897, your office rejected and returned said appeal, and declined to transmit the same, and it is from this action of your office that the protestants seek relief by their petition for the writ of certiorari.

As to the character of the land, it is manifest that the contest, between the State of Montana and Jane Craig, settled that question, and determined conclusively that the lands were valuable for coal mining at the time of the entry and up to the date of the hearing. The land was found to contain a sufficient quantity of merchantable coal to except it from the terms of the grant of section 36 in each township for school purposes, under the provisions of the granting act, which excepts mineral lands from the grant, and the State has submitted to this decision by its failure to appeal from the decision of your office within the time limited therefor, has made no attempt to insist further upon its rights to the land, and has evidently acquiesced in such decision.

While the character of the land as a present fact is the question to be determined where it is involved, and a determination at one time does not necessarily preclude a subsequent inquiry as to the character of the tract where a change in that respect is alleged, the proof must be clear and convincing in order to secure a further hearing. (*Barnstetter v. Central Pacific R. R. Co. et al.*, 21 L. D., 464; *Stinchfield v. Pierce*, 19 L. D., 12.) It appears that the nature and extent of the coal deposits on the tract up to the time of entry and payment for the land, and up to the time of the hearing, were once adjudicated in favor of the one making the entry, and ought not now to be disturbed, particularly when it is attempted to obtain a hearing mainly upon the abandonment of the land for coal mining purposes prior to the entry. That matter has been settled, and although the parties now attempting to assert their rights as townsite claimants were not parties to that controversy, yet one ground of the protest of their State was that the land was "more valuable for agricultural and townsite purposes than for the purposes of mining and taking coal therefrom," and these matters were directly adjudicated in the hearing between the State and the coal entryman.

As to the change in the character of the land, since the entry, but little reliance is placed upon that contention. In the proceeding at bar it appears about thirteen months have elapsed since the hearing of the contest between the State of Montana and Jane Craig. The reliance of the protestants is mainly upon the fact that the land had been abandoned as coal lands before the entry and prior to the hearing, and but little stress is laid upon the period since the entry, as the conditions have not changed during that time.

One allegation of the affidavits of protest is that the land was entered for the benefit of others than the entryman.

Such a question was not raised in the protest of the State of Montana, but evidence was submitted by the State on that point, and error was predicated on the finding of the local office adverse to the State thereon. On appeal, your office fully considered that question as a ground of protest, and decided it in favor of the claimant, and from that decision there has been no appeal. It will be considered as a matter in dispute finally adjudicated and passed upon, and not to be re-opened, on the showing made in the affidavits filed by the protestants.

The allegations of the affidavits are indefinite and vague, are broadly made in general language, and do not specifically state the facts or indicate the sources of the information or knowledge of the affiants. It is charged that a mercantile firm or company furnished the means to pay for the land and to defend the contest, and that such firm procured a bond for a deed of the tract, and after the contest was closed obtained a deed therefor.

Whether these instruments were secretly executed and delivered or appear of record is not shown. The bare allegations that such instru-

ments were executed and that the entry was made for the benefit of another are not sufficient, for naked conclusions of fact, however sufficient and proper in ordinary pleadings, can not be considered as evidence. Affidavits are well termed the lowest grade of proof, and to entitle them to weight as evidence they should set forth facts specifically. Mere general statements, which involve questions of law as well as of fact, are insufficient. The office of an affidavit is to disclose evidence from which conclusions of fact may be drawn, and not to state conclusions of fact. (1 Encyc. P. & Pr., 322, Note 4.)

The statements of one of the witnesses at the contest that he received a life lease of a parcel of the tract in dispute, and certain privileges by way of business thereon, are not entitled to much weight. Such facts do not warrant the inference that his testimony at the hearing was false.

In the absence of a law or binding rule to secure the compulsory attendance of witnesses in land contests, parties litigant are often compelled to provide means for the payment of the expenses and loss of time of their witnesses, and such action does not necessarily indicate fraud nor moral turpitude.

Owing to the prior adjudication of the character of the land, and the looseness and indefinite character of the charges of fraud and collusion on the part of the entryman and others, it appears that an appeal would but result in the affirmance of your office decision dismissing the contest. A writ of certiorari will not issue where the petitioner fails to show that the decision complained of is erroneous and did not render substantial justice in the premises. (*Spurlock et al. v. Crane*, 24 L. D., 570.) It is not a writ of right, but lies in the discretion of the Secretary of the Interior, and issues when an affirmative showing is made of injustice in the decision below. (*Adams et al. v. Northern Pacific R. R. Co.*, 23 L. D., 529.)

But in no case will the Department interfere with the discretion of your office in refusing to order a hearing, unless there is such an abuse of discretion as would work an injustice, or an inequitable denial of a legal right. (*Town of Amargo v. Vorhang*, 20 L. D., 359; *Wilder v. Parker*, 11 L. D., 273.)

Such an abuse of discretion does not appear. The allegations as to the character of the lands involved, and of the speculative character of the entry, are not a new showing, having been adjudicated in a former hearing; some of the charges are generally and loosely made; and as a whole they are insufficient to warrant further investigation as to the validity of the entry.

The writ of certiorari is denied and the petition is dismissed.

APPLICATION FOR SURVEY—ISLAND—NAVIGABLE STREAM.

WILLIAM A. BARRON.

An island, not above high water mark, but subject to overflow, and situated in a navigable river, is not subject to survey and disposal as land belonging to the United States, for the proprietorship of the shores and beds of navigable rivers below high water mark, within the limits of the States, belongs to them by their inherent sovereignty.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 16, 1897. (C. W. P.)

On June 19, 1897, you submitted the application of William A. Barron, of Miller county, Missouri, for the survey of an island, described as being in the Osage River, in sections 20 and 29, township 40 north, range 14 west, State of Missouri.

It is shown by the affidavits accompanying said application that the island contains about thirty or thirty-five acres of land; that the width of the channel between the island and the main shore is from two hundred to three hundred feet, and the depth thereof at ordinary stages of the water is about three to eight feet; that the island is *not* above high water mark, and is subject to overflow, "but not until the low bottoms on either side of the channels are overflowed," and the land fit for agricultural purposes; that the configuration of either shore of the main land has changed, "the south shore of the island somewhat by widening it, but the north shore has not changed," since the original survey of the water front on the main land; that the improvements on the island are as follows: "From 12 to 15 acres in cultivation, has been fenced and a log cabin was erected thereon. Fence now removed." That said improvements were made by Burrell Burris, Jr., in 1884 or 1885, who built the cabin and farmed the land; also by George Graham before said Burris, and the total value thereof is about \$100.

Notice of the application for survey appears to have been served upon Boyd S. Miller and Thomas J. Neal as owners of the lands on the shores opposite the island, who appear to have acknowledged the service of notice.

From the affidavits filed by applicant after the filing of the application, it would seem that the island existed at the time of the survey of the township, and that the river wherein the land is situated is navigable, but no island is shown upon the official plat of the survey of said township, made in the year 1820-1821, in the locality represented on the diagram submitted by the applicant.

No protest appears to have been filed against said application, either by the State of Missouri or by the riparian owners. You recommend that the application be disallowed.

The survey applied for can only be ordered when it clearly appears that the land belongs to the United States; otherwise the Department

has no jurisdiction, and therefore no power to direct a survey. L. F. Scott, 14 L. D., 433.

It appearing from the affidavits which accompany the application that the island is not above high water mark and is subject to overflow, and that the river is navigable, the island is not subject to survey and disposal as land belonging to the United States, as it is well settled that the proprietorship of the shores and beds of navigable rivers below high water mark within the limits of the States belongs to the States by their inherent sovereignty.

It is said in *Packer v. Bird*, 137 U. S., 661, 669:

The courts of the United States will construe the grants of the general government without reference to the rules of construction adopted by the States for their grants; but whatever incidents or rights attach to the ownership of property conveyed by the government will be determined by the States, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee,

and the following passage from the case of *Barney v. Keokuk*, 94 U. S., 324, 338, is quoted:

Whether, as rules of property, it would now be safe to change these doctrines where they have been applied, as before remarked, is for the several States themselves to determine. If they choose to resign to the riparian proprietor rights which properly belong to them in their sovereign capacity, it is not for others to raise objections. In our view of the subject the correct principle was laid down in *Martin v. Waddell*, 16 Pet., 367; *Pollard's Lessee v. Hagan*, 3 How., 212; and *Goodtitle v. Kibbe*, 9 How., 471. These cases related to tide-water, it is true; but they enunciate principles which are equally applicable to all navigable waters. And since this court, in the case of *The Genesee Chief*, 12 How., 443, has declared that the great lakes and other navigable waters of the country, above as well as below the flow of the tide, are, in the strictest sense, entitled to the denomination of navigable waters, and amenable to admiralty jurisdiction, there seems to be no sound reason for adhering to the old rule as to the proprietorship of the beds and shores of such waters. It properly belongs to the States by their inherent sovereignty, and the United States has wisely abstained from extending (if it could extend) its survey and grants beyond the limits of high water.

And in the cases of *St. Anthony Falls Water Power Company v. The Board of Water Commissioners of the City of St. Paul*, and *The Minneapolis Mill Company v. same*, 168 U. S., , the principles announced in *Packer v. Bird* and *Barney v. Keokuk*, *supra*, are adopted.

In view of the above, your recommendation that the application of Mr. Barron be disallowed, is approved.

RAILROAD GRANT—INDEMNITY—SPECIFICATIONS OF LOSS.

NORTHERN PACIFIC R. R. Co.

The grant to the Northern Pacific by the act of July 2, 1864, and the grant to the same company by the joint resolution of May 31, 1870, must be adjusted separately; a loss, therefore, under the latter grant, will not support a selection along the line for which the grant of 1864 was made.

In the absence of an ascertained deficiency in the grant to the Northern Pacific, showing that it could not be satisfied by obtaining all the available lands in the indemnity limits, the specification of losses in place, as a condition to the selection of indemnity will not be waived by the Department.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 20, 1897.* (F. W. C.)

With your office letter of June 25, 1896, was transmitted for the approval of this Department, as the basis for patent, clear list No. 43, embracing lands selected within the Walla Walla land district, Washington, on account of the grant to the Northern Pacific Railroad Company. Said list contained selections from lands within the indemnity limits opposite the portion of the road between Wallula Junction and Spokane Falls, or along the main line to aid in the construction of which a grant was made by the act of July 2, 1864, (13 Stat., 365). Lands lost opposite the portion of the road between Portland, Oregon, and Tacoma, Washington, a grant for which was made by the joint resolution of May 31, 1870, (16 Stat., 378) were specified as bases for said selections. For this reason the list was informally returned to your office with the request that in returning the list you express an opinion as to whether said lost lands formed a proper basis for the selections in question.

The list is now again before the Department with your office letter of October 5, 1896, in which, after referring to the decision of the supreme court in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1) and the decision of this Department in the case of the Hastings and Dakota Railway Company (19 L. D., 30), you recommend that the list be approved.

In the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57) it was held that (syllabus):

At Portland, Oregon, the Northern Pacific has two grants, the first for the line eastward, under the act of 1864, and the second northward, under the joint resolution of 1870, and so far as the limits of the grant east of said city overlaps the subsequent grant, the latter must fail; and, as the road at such point eastward is unconstructed, and the grant therefore forfeited by the act of September 29, 1890, the lands so released from said grant do not inure to the latter grant, but are subject to disposal under the provisions of said forfeiture act.

The reasoning for this decision requires that these two grants be adjusted separately, for on no other theory could it be held that the lands within the overlapping limits in the neighborhood of Portland and opposite the unconstructed portion of the line to aid in the construction of which the grant was made by the act of 1864, were excepted from the grant for the portion of the road northward from Portland. This being so, it must be clear that a loss along the portion of the line from Portland to Tacoma would not support an indemnity selection along the line to aid in the construction of which the grant was made by the act of 1864. It must therefore be held that the bases named do not support the selection.

Your office letter of October 5, 1896, resubmitting the list, states:

It has been uniformly settled by the supreme court of the United States and your office that the designation of losses was a regulation intended to be enforced only where there was a surplus of indemnity lands. Where, however an ascertained deficiency exists the danger of duplicating indemnity did not exist, and the necessity for designating losses thereby terminated.

* * * * *

In the case of the Northern Pacific Railroad Company this office has ascertained that its grant is over three and one half million acres deficient, and had further certified that if it secure every available acre within its indemnity limits it could not satisfy by three and one half million acres the losses which it has experienced up to the present time.

It is then recommended that the list be approved without regard to the sufficiency or insufficiency of the particular losses specified.

If it were in fact ascertained that the grant to the Northern Pacific Railroad Company is so deficient that it can not be satisfied by obtaining all the available land within the indemnity limits, the question would arise whether there is any necessity for the continued specification of losses of lands in place as a condition to the selection of indemnity lands. It is clear that the ascertainment of such deficiency would at least dispense with all occasion to specify losses as a basis for future selections and that the Department should issue an order to that effect.

Has the existence of such a deficiency been ascertained or established?

As before shown, on October 5, 1896, your immediate predecessor stated that if the railroad company

secure every available acre within its indemnity limits it could not satisfy by three and one half million acres the losses which it has experienced up to the present time.

Under date of February 23, 1897, in answer to a Senate resolution of the 19th of that month, it was stated by your office that in the grant to the Northern Pacific Railroad Company there was "an ascertained deficiency in the entire grant of over 559,889.99 acres."

May 27, 1897, The Department called upon your office for a statement of the status of this grant; inquired whether the statement made in the answer to the Senate resolution was correct, and if so, called for the data or means of calculation whereby that result was ascertained. Your office letter of November 5, 1897, in answer thereto, is now before the Department, wherein it is stated there is "an approximate deficiency in the entire grant of 530,573 acres." This letter shows that there has been no actual ascertainment of the amount of the deficiency, or that any deficiency exists, and that any statements or certifications upon this subject heretofore made by your office are only estimates based, among other things, upon an approximation of the percentage of lands which may hereafter prove to have been excepted from the grant by reason of their mineral character.

The statements of October 5, 1896, and February 23, 1897, purport to represent definite and certain ascertainment, while the statement

of November 5, 1897, is expressly said to be an approximation based upon certain assumed percentages and calculations, the accuracy of which is not susceptible of present demonstration.

The fact that the deficiency was stated on October 5, 1896, to be 3,500,000 acres, and on February 23, 1897, to be 559,889 acres, and on November 5, 1897, to be approximately 530,573 acres, does not harmonize with the statement made in the letter of October 5, 1896, that

necessarily the losses of the company will increase as time progresses, whilst the available indemnity will decrease and thereby the deficiency already ascertained will constantly grow.

The confusion and uncertainty in these conflicting statements prevent me from finding or saying with any degree of confidence, or at all, that there is an ascertained or established deficiency in this grant.

It appearing that the bases now assigned will not support the selections made in the list now under consideration, and there being no ascertainment of a deficiency in the grant, the list is herewith returned without my approval, and you will advise the company accordingly, to the end that it may specify other and sufficient bases.

CHARACTER OF LAND—MINERAL AND AGRICULTURAL CLAIMS.

WILSON *v.* DAVIS.

A departmental determination that a tract of land is non-mineral in character, based principally upon the ascertainment of the boundaries of the tract in dispute, will not preclude the land department in a subsequent suit, resting on alleged discoveries made after the hearing in the former case, from considering anew the question of boundaries, and rendering judgment as to the character of the land in accordance with the facts so disclosed.

The fact that no one is claiming a tract of land under the coal land law, that is shown to be principally valuable on account of coal, will not justify the Land Department in the allowance of a homestead entry therefor.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) December 20, 1897. (E. B., Jr.)

The land involved in this case is described as the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of section 13, T. 31 S., R. 65 W., Pueblo, Colorado, land district. The same tract was involved in the case of *Davis v. Tanner et al.* (20 L. D. 220). Davis then as now claimed the land under the homestead law, and Tanner, and the Victor Coal and Coke Company as transferee of Tanner, claimed it under the coal land law. In that case the Department, accepting a plat of the plaintiff as correctly showing the boundaries of the tract with reference to the coal measures alleged by the defendants to exist therein, decided, *supra*, March 19, 1895, that it had not been shown that a vein containing merchantable coal in any considerable quantity entered the tract, and that the same, although of little value for purposes of agriculture, was fairly good grazing land. Pursuant to that decision, which reversed the decision of your office,

Tanner's coal entry made December 31, 1889 (declaratory statement filed Nov. 7, 1888), was canceled as to said tract, and Davis' homestead entry therefor made August 15, 1889, was allowed to remain intact.

The hearing in the case of *Davis v. Tanner et al.* was concluded in June, 1892. While that case was pending, James Wilson, on March 22, 1892, filed a contest affidavit charging against Davis abandonment of said tract and failure to reside upon, cultivate and improve the same as required by law. On September 4, 1895, Wilson filed an amended contest affidavit in which it was further alleged that said tract was within the limits of the incorporated town of Hastings, Las Animas county, Colorado, and "actually settled upon and occupied for purpose of trade and business and not for agriculture," and that since the trial in *Davis v. Tanner et al.*, valuable deposits of coal had been discovered on the land which was on account thereof more valuable than for agricultural purposes. Upon these allegations hearing was duly ordered and had, the testimony being taken by Allen J. Beamont, United States circuit court commissioner, District of Colorado, as per stipulation of the parties, commencing February 18th, and ending February 22, 1896. On March 3, 1897, the local office rendered its decision, concluding as follows:

From a careful consideration of all the testimony submitted, we find that the contestant has fully sustained his charge of abandonment, and established the coal character of the land. We are of the opinion that claimant has wholly abandoned said tract for a period of more than six months prior to the initiation of the contest and that the tract is more valuable for its coal deposits than for agricultural purposes.

We therefore recommend that homestead entry No. 6061 (6011) be canceled.

On appeal by Davis your office on June 7, 1897, reversed the decision of the local office holding that the charge of abandonment had not been sustained, and that it had not been shown that the tract was of "such value for coal contained as to exempt it from homestead entry." From the decision of your office Wilson has appealed to the Department assigning several errors therein, only one of which assignments requires consideration and discussion, viz:

In holding that the land is not shown to be more valuable for coal mining than for agricultural purposes.

In the case of *Davis v. Tanner et al.*, it was conceded by the Department that if the boundaries of the land were as contended for by the defendants the land was more valuable for its coal than for agriculture. In this connection it was said in the decision in that case:

The only issue here is as to the character of the land, the question as to the good faith of the defendant having been abandoned. The determination of this question rests wholly upon the correctness of the surveys on the ground that have been submitted, because, if the survey sought to be established by the defendant be accepted, then it is shown that the "Davis forty," so-called, is most valuable for coal, while if that claimed by Davis to be correct is adopted, then it is clear there is but little, if any, practical value in the land for the coal therein.

It is well known generally in the neighbourhood of the tract in controversy, and conceded by Davis that extensive and very valuable coal beds lie in the immediate vicinity of the tract. It was also a matter of common knowledge and established by the testimony in the case that numerous monuments of the public survey in that neighbourhood had been missing for several years, among which were the south-west corner of said section 13 and the quarter corners between said section and sections 14 and 24, respectively, the latter quarter corner being the south-west corner of the land in controversy. At the time of the hearing in *Davis v. Tanner et al.*, the last mentioned corner had not been found nor had the necessary steps then been taken to establish it, nor were they taken until long afterwards.

The said tract lies immediately adjacent, on the north and north-west, to the town of Hastings above mentioned. Upon the application of the mayor of Hastings and pursuant to the laws of Colorado (Mills Annotated Statutes of Colorado, section 4317) the county surveyor of Las Animas county, said State, on November 11, 1895, made the official survey necessary to establish the missing corners above specified, and also established likewise, or discovered, other corners that had been lost or missing in the vicinity. From the corners thus established the said surveyor at the request of the contestant surveyed the boundaries and established the other corners of the said tract. Davis was present in person when these surveys were made. From these recent surveys and the testimony in the case it clearly appears that at the time of the hearing about three and one half acres of the said tract in the north-west corner thereof was underlaid by a seven foot vein of coal; that about two-thirds of an acre of this coal, which yielded seven thousand tons to the acre, had been mined, commencing in 1891 and continuing to the spring of 1894, and that more than two acres of similar merchantable coal yet remained in that part of the tract; and that to a reasonable certainty the same vein underlies from five to seven acres additional of the tract along the north and east sides thereof, of which, after making due deduction on account of deteriorated coal along the outcrop, at least three to four acres of the vein is merchantable coal.

It is also shown that a four foot vein of coal underlies a still larger area of this tract, at a lower level than the seven foot vein. Mining operations on this tract and vicinity have been substantially confined to the seven foot vein. As mining on that vein must necessarily be more profitable it is not to be expected that any extensive mining will be done on the lower and smaller vein until the former is exhausted. If there be eliminated for the sake of the argument in this case, all consideration of coal within the tract except that which is clearly shown to exist in the seven foot vein in the north-west portion of the tract, it must still be held that the tract is far more valuable for its coal than for agricultural purposes. It is practically conceded that the tract is of no appreciable value so far as the raising of crops of grain, hay or

vegetables is concerned. No such crop has been raised thereon by Davis or any one else. The land has a very little value for grazing. It is in evidence and not successfully controverted that for such purpose it would not be worth to exceed one dollar and twenty-five cents per acre. The royalty on the two acres of coal remaining in the northwest part of the tract is shown to be worth at least fourteen hundred dollars.

Although not urged in argument before the Department, it was urged at the hearing that the question of the existence of coal on this tract was *res judicata* under the decision in *Davis v. Tanner et al.*, *supra*. The Department does not accept this view of the case. It is well settled by numerous decisions in cases between parties asserting the mineral and agricultural character of public land, respectively, that a departmental determination upon such subject is only conclusive up to the close of the hearing in the particular case. Subsequent exploration and development may show that a tract thus adjudged to be agricultural is in fact mineral in character, and upon due proof thereof in due proceedings the Department will render a new judgment in accordance with such fact. The same general rule would apply as well in a case where there was a controversy as to the boundaries of the land with reference to the mineral deposits as in a case where there was no such controversy. In the former case the question of boundaries would simply constitute an additional element in the determination. It might or it might not be the controlling element.

A determination of the character of land based chiefly or wholly upon the acceptance of certain boundaries which do not inclose the mineral deposits is no more permanently conclusive, in the nature of things, as to the character of the land, than a determination of the character of land in a case wherein there is no dispute concerning boundaries. As long as the subject matter of the controversy, the land itself, is within the jurisdiction of the land department it has the same authority to determine anew the boundaries of a tract of public land, when the question of boundaries is involved in the question of the known character of the land prior to the issue of final certificate, as it has to determine any other question within its jurisdiction. The correct determination of the boundaries of the tract in controversy is essential to the correct determination of its character as public land, and therefore to the proper disposal of the land under those laws only which relate to land of its particular character.

Much of your office decision is given to the discussion of the alleged antagonism to Davis by the Victor Coal and Coke Company, and of its alleged active interest in the initiation and conduct of the contest by Wilson. As the attitude of the company toward Davis could have no important bearing upon the only question now under consideration by the Department, viz: the character of the land, and as Wilson has waived his preference right of entry, thus occupying now only the

status of *amicus curiae* in the case, and leaving the case between Davis and the government only, neither the alleged antagonism nor the alleged interest in the conduct of Wilson's contest requires any discussion here. It is deemed proper to say, however, in passing, that a very careful examination of the testimony fails to disclose any substantial foundation for the conclusion reached in your office decision that the said company or its officers was or were, directly or indirectly, responsible for the efforts made by the people of Hastings to rid themselves of the presence of Davis. These efforts, as the testimony shows, including the statements of certain of Davis' own witnesses, were induced by his persistent attempts to establish and conduct a saloon in such manner and at such point or points in the town of Hastings (one point especially objectionable being near the public school building), in defiance of law and public opinion, as to greatly irritate the people and the authorities of the town, and excite against him their violent opposition.

Notwithstanding, as your office decision suggests, no one is now claiming the tract in controversy under the coal land laws, still the land department cannot ignore the fact that the same being coal land is not subject to disposal under the homestead law. It was known to Davis when he made his homestead entry that Tanner had filed his coal declaratory statement for the land. The coal outcrops thereon stood out boldly and prominently, and he probably knew of the mine Tanner had already opened. He cannot now justly complain if the decision of the Department is adverse to him. He has done but very little, as evidence of good faith, in the way of improving the land.

The decision of your office is accordingly reversed. The entry of Davis will be canceled.

MINING CLAIM—TOWNSITE PATENT—KNOWN LODE.

PACIFIC SLOPE LODE *v.* BUTTE TOWNSITE.

A townsite patent that in terms provides that "no title shall be hereby acquired to any mine . . . or to any valid mining claim or possession held under existing laws of Congress," does not divest the Department of jurisdiction to subsequently issue a patent for a lode claim within the limits covered by said townsite patent, if at the date of the townsite entry such lode claim was known to exist. The cases of the Pacific Slope Lode, 12 L. D., 686, and the Cameron Lode, 13 L. D., 369, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) December 20, 1897. (G. B. G.)

On February 10, 1897, Messrs. Burdett, Thompson and Law filed in your office the following communication:

WASHINGTON, D. C., February 10, 1897.

Hon. S. W. LAMOREUX,

Commissioner of the General Land Office.

SIR: We have the honor to call your attention to the matter of mineral entry No. 819 of John C. C. Thornton *et al.*, Helena land office, Montana, and to request that patent thereon may be speedily ordered to issue.

The said entry was allowed in 1882 and is consequently about fifteen years old. It has been suspended because of conflict with the Butte townsite entry; but at a hearing held in 1889 to determine the question whether or not the said lode claim was valuable and known to exist prior to the occupation thereof for townsite purposes, it was proved that said lode was valuable, and that it was known to exist and publicly worked for a long time prior to such occupation.

Heretofore the Honorable Secretary of the Interior made recommendation to the Attorney General of the United States that proceedings be instituted for the cancellation of the townsite patent as to the tract in question, with a view to the issue of patent on the Pacific Slope lode. There is on file with the case a recent report of the Attorney General showing that no suit has been brought. In view of the principle announced in the case of the South Star Lode (On Review) 20 L. D., 204, such suit is unnecessary.

We respectfully ask, therefore, that the said entry may be relieved from suspension and patent issued in accordance with the said ruling.

Very respectfully,

BURDETT, THOMPSON AND LAW.

By your office letter of February 23, 1897, the attention of the Department was called to this matter, in the following language of description and recommendation:

I am now in receipt of a motion by resident counsel for the Pacific Slope lode claimants, asking that patent be issued for said claim under the principle laid down by the Department in the case of the South Star Lode, 20 L. D., 204.

Of course, if suit is pending to vacate the Butte City townsite patent as to conflict with said mining claim, favorable action upon said motion would seem to be precluded, if not by law, at least by the courtesy due the Department of Justice.

I regard the motion however as being of sufficient merit to warrant a careful consideration, under the approval of the Department, provided no suit is pending.

In view of the foregoing, I have the honor to recommend that the Honorable Attorney General be requested to report the present *status* of the matter and that he be requested, should no suit be pending, to direct a stay of all action in the Department of Justice, until said motion shall have been passed upon by the Department.

By departmental decision of June 25, 1891 (12 L. D., 686), it was found that the Pacific Slope lode claim was located and duly recorded on May 28, 1874, in book "F" at page 215 of the lode records of the Summit Valley mining district, Montana; that the townsite entry of the townsite of Butte, Montana, was made July 25, 1876, and that a patent issued thereon September 26, 1877; that on April 13, 1882, the lode claim entry was made, the claim paid for, and the proprietors received a receipt and certificate therefor; that this mineral entry conflicts in part with the aforesaid patented townsite. It was further found that this lode claim being based on a record location made prior to the townsite entry, was known to exist at the date of said townsite entry.

On this state of facts the Department then said:

It is contended by counsel for the mineral claimants that the Department has jurisdiction to issue a patent for the lode, notwithstanding the fact that a patent has already been issued covering the surface embraced in the lode claim, maintaining that it is not a question of the issue of a second patent for the same land since the townsite patent expressly carved out and did not purport to convey the mineral claim.

This contention is untenable. The ground contended for is the same that is covered by the townsite patent, and, while the townsite may be compelled to surrender portions of its ground because of the prior right of the Pacific Slope lode claim, this Department is not the proper tribunal in which to seek that kind of relief. The surface of the ground included in the patent of the townsite is described by metes and bounds; no described exception is found therein, and any attempt of this Department to issue a second patent covering any part of the surface described in the townsite patent would be without authority. (Pike's Peak Lode, 10 L. D., 200.)

* * * * *

Since it is shown both by the evidence submitted at the hearing in this case and the records of the county wherein the land in question is situated, that the existence of the Pacific Slope lode claim was known when the townsite entry was made and patent issued, you will prepare a proper record of all the papers in the case and transmit the same to this Department with a view of their transmittal to the Attorney-General, in order to have a suit instituted in the proper court to have declared vacated so much of the patent of the townsite of Butte as includes the Pacific Slope lode claim.

Said mineral entry will be suspended pending further proceedings.

A certified copy of the record was transmitted to the Department by your office on July 25, 1891, and on July 30, 1891, suit to vacate said townsite patent as to conflict with said mining claim was recommended to the Department of Justice. Correspondence on file shows that this suit was not instituted, and on March 30, 1897, the Department of Justice was requested to "take no further action in premises until advised by this Department," and your office was so notified by letter of the First Assistant Attorney of April 10, 1897.

I have now your office letter of August 17, 1897, laying the matter before the Department for instructions.

At the time the aforesaid departmental decision of June 25, 1891, was rendered, the view here entertained was that the issuance of a patent, which conveyed the surface of the ground, deprived this Department of all jurisdiction to afterwards patent any title or interest remaining to the government beneath the surface of the land so patented, unless such reserved interest was specially described and excepted by metes and bounds; and that this was true, whether such remaining interest was reserved by statute from the operation of the patent, or in general terms by the patent itself, or both. Under this rule the remedy was in the courts: hence the aforesaid recommendation of a suit to vacate said townsite patent to the extent of conflict with the mineral location. This rule had its chief support in adjudications growing out of conflicts between placer and lode locations, it being held that a patent for placer ground, excepting in general terms all known lodes within the limits of the surface ground covered by the placer patent, terminated departmental jurisdiction as to such known lodes.

In the case of the South Star Lode (on review), 20 L. D., 204, it was held:

When it is ascertained by inquiry instituted by the Department, or determined by a court of competent jurisdiction, that a lode claim exists within the boundaries of the land covered by a placer patent, and that such lode claim was known to exist at

the date of the application for such patent, and was not applied for, it must be held that the land embraced in said lode is reserved from the operation of the conveyance by the general terms of exception therein, and that patent may issue therefor, if the law has been in other respects fully complied with.

The case of the Pike's Peak Lode, 14 L. D., 47, overruled.

(Syllabus.)

This case has been followed in numerous adjudicated cases since, and is now the well settled law of the Department.

There is no difference in principle between the question decided in the South Star Lode case (*supra*) and the one here presented.

Section 2318 of the Revised Statutes provides:

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

And section 2392, chapter eight, wherein is regulated the "reservation and sale of town-sites on the public lands," provides that:

No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar or copper; or to any valid mining-claim or possession held under existing laws.

If this were all, it might be argued with force that the issuance of the patent for the Butte City townsite had the effect of an adjudication by this Department that no mine of gold, silver, cinnabar or copper existed within the limits covered thereby, and that no valid mining claim or possession was held therein under existing law, and, therefore, the legal title to everything within the exterior limits of the patented ground passed by that instrument, and it would follow by a well settled rule of departmental construction that the Department would be thereby ousted of jurisdiction.

But the record of the instrument itself has been examined, and it appears that the patent contains the following reservation, to wit:

No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper or to any valid mining claim or possession held under existing laws of Congress.

This being so, the argument in the South Star Lode case (*supra*) applies with force to the question here presented. The law provided that no title should be acquired to this lode claim under the townsite laws, and the townsite's evidence of title excepts it therefrom.

There remains, therefore, a non-patented and patentable interest in the government.

If it be suggested that the right to the use of town lots will be seriously interfered with by the recognition and patenting of mining interests therein, this is answered by reference to section 2386 of the Revised Statutes, wherein such interests are distinctly recognized. It is therein provided:

Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

The policy of the government here being formulated in distinct legislative expression, nothing is left for executive discretion, except an ascertainment of the facts. That has been done in this case.

I have therefore to direct that a patent issue to the mineral claimants herein, unless further objection appears.

The cases of the Pacific Slope Lode (*supra*) and the Cameron Lode (13 L. D., 369,) are overruled, in so far as they conflict with the views herein expressed.

RAILROAD LANDS—ACT OF SEPTEMBER 29, 1890—HOMESTEAD.

WEIDERT ET AL. *v.* KROLL.

An actual settler on lands embraced within the forfeiture act of September 29, 1890, at the date of the passage of said act, is entitled to a preferred right of homestead entry, and if he dies, without having made such entry, the right survives to his widow, who was also at such time residing on said land.

Where the widow in such case makes homestead entry, and thereafter through mistake relinquishes said entry, and purchases the land under section 3, of said act, when in fact not entitled to make such purchase, the entry may be reinstated with the right to treat said purchase as a commutation thereof, or perfect said entry in the regular manner.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) December 20, 1897. (C. J. W.)

The land involved in this case is the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of lot 1, and the E. $\frac{1}{2}$ of lot 2 of the NW. $\frac{1}{4}$ of Sec. 3, T. 5 N., R. 33 E., containing 159.31 acres, in La Grande land district, Oregon. It was granted to the Northern Pacific Railroad Company, and was forfeited and restored to the public domain by the act of September 29, 1890 (26 Stat., 496).

On September 29, 1890, John Kroll (a native of Germany, who had declared his intention to become a citizen of the United States in the district court of the sixth judicial district, for Noble county, Minnesota, on the 20th day of April, 1874,) was, and for several years previous had been, an actual settler in good faith on the land aforesaid. He died at his residence on said land, on February 27, 1891, intestate, leaving surviving him a widow, Mary Kroll (or Krull), and four children, Julia Weidert, Anton Kroll, Lorenz Kroll, and Marie Kreigel, all of full age, his only heirs at law.

On March 21, 1891, Mary Kroll (or Krull), who had resided with her husband on said land from the time of their settlement until his death, and who was therefore there September 29, 1890, made homestead entry, No. 5100 of the same, alleging in her homestead affidavit:

That I made settlement on said tract on February 12, 1885, and have resided on said tract ever since, and have made improvements thereon, consisting of house, well, and two miles of fencing, and that the value of the same is \$900.

On September 22, 1891, she filed a relinquishment of her said homestead entry, and on the same day she purchased, and made cash entry, No. 4896, of the same land under section 3 of the act of September 29, 1890.

On May 2, 1892, Julia Weidert (the wife of John Weidert, and the youngest child of John Kroll, deceased), on behalf of herself and her sister and brothers, above named, filed her affidavit of contest against said cash entry, alleging, in substance, that John Kroll made settlement upon the land in 1886, and resided thereon until the time of his death (February 27, 1891), and had made valuable improvements with the intent to purchase under a general license from the railroad company when it should have earned the lands; that affiant and three others named are the children and heirs of said John Kroll, deceased, and are over the age of twenty-one years and citizens of the United States, and entitled to purchase under the act of September 29, 1890; that Mary Kroll never settled upon said tract, and was never in possession of the same in any manner at all on September 29, 1890, or at any time prior thereto; that she was not entitled to make cash entry, No. 4896, either in her own right, or as the widow of John Kroll, deceased; that said entry is in fraud of contestants' rights as heirs; that, on March 21, 1891, Mary Kroll, with intent to defraud said heirs, made homestead entry of said land, and thereafter advertised to make final proof on September 8, 1891; that on said day affiant appeared as one of the heirs and protested against the acceptance of said proof; that thereupon defendant relinquished said homestead entry, and made cash entry, No. 4896.

On the charges as above outlined, contestants asked for a hearing, to the end that said cash entry be canceled and they be allowed to purchase under the provisions of the act of September 29, 1890.

By letter ("H") of September 15, 1892, your office directed the local officers to order a hearing. After the hearing, the local officers recommended that the contest be dismissed, and that the widow's cash entry, No. 4896, be held intact. On February 26, 1894, your office reversed said decision, and held said entry for cancellation. The widow has appealed to this Department.

It is proved that in the year 1885 John Kroll and Mary Kroll, his wife, established their residence on the land in contest. They went upon it on the invitation of John Weidert, the husband of the contestant, Julia Weidert, he then having more land than he could hold. They remained upon the land until February 10, 1888, when Weidert and his wife asserted claim to it, whereupon John Kroll took a quitclaim deed from them to all right they might have in the land, the consideration expressed in the deed being two hundred dollars. From that time forward John Kroll and Mary continued to reside upon and cultivate the land as actual settlers until the death of John, on February 27, 1891. It appears that when the old people settled upon the land, they had

between six and seven hundred dollars in money. John Weidert and his wife got two hundred dollars of it in consideration for their quitclaim deed, and Weidert borrowed from them four hundred and fifty dollars. John Kroll was upwards of seventy years of age and feeble; could do no work of any consequence; his wife, Mary, was twelve years younger, and in good health. She attended to all business and rented out the farm; she at the date of the hearing had exhausted her resources, except forty dollars, loaned out.

There are three classes of persons who are protected by the provisions of the forfeiture act aforesaid. The second section confers a preference right of entry upon actual settlers in good faith on lands covered by it, on making claim under the homestead laws and this act. The third section provides for qualified citizens of the United States, who may not be actual settlers, but who are in possession of lands, under deed, written contract with, or license from the State or corporation, claiming it under a legislative grant, or its assignees, executed prior to January 1, 1888, or where persons may have settled on said lands with the *bona fide* intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress. Thus, two classes are entitled to purchase under the third section of the act: First, those who are in possession, actual or constructive, under deed, written contract, or license; and, second, settlers who settled with *bona fide* intent to secure title from the State or corporation to which the grant was made.

That your office concluded John Kroll belonged to one or the other of the classes last named is apparent, but it does not distinctly appear which one. If he belonged to neither, then it follows that, without regard to the rights of Mary Kroll, the widow of John Kroll, his heirs would have no right to purchase under said section. First, then, was John Kroll in possession of the land under a deed, written contract, or license from the railroad company, executed prior to January 1, 1888, made directly to him or assigned to him. It is sufficient to say that the best evidence of such deed, written contract, or license, is the instrument itself, and that parol evidence is not admissible, to show such deed or contract, or the contents thereof, until it is first shown that it is not in the power of the party offering secondary evidence to offer the paper itself. In this case, the existence of a license, the contents of it, and its assignment (which assignment must have been in writing also), are attempted to be shown by the parol testimony of the husband of the contestant, and without laying any foundation for secondary evidence, or showing any effort made to secure the paper itself. The administrator of John Kroll was acting in the interest of the heirs, and adverse to the right of the widow to enter the land, and was a witness at the hearing, and was neither asked to produce this paper nor to state if he knew of its existence. Mary Kroll was a witness, nor is any question

asked of her as to the existence of such paper or any knowledge which she might have of it.

A copy of the quitclaim deed, executed by John Weidert and his wife Julia to John Kroll, is appended to the record as an exhibit, and was in evidence at the hearing. It makes no reference to any license or contract with the railroad company; it affords no support to the theory that Kroll was in possession as an assignee under the railroad company. One of the parties to this transaction is dead, and can not be heard, and to allow the other party to say verbally what the character of the transaction was, when the law requires that it should be in writing, would be a most dangerous precedent, as well as violative of the rules of evidence. There is, therefore, no legal evidence in the record showing that John Kroll was in possession of the land as a transferee of a license from the railroad company, and therefore entitled to purchase under the third section of the act aforesaid.

But did he belong to the other class of persons who might purchase under this section?

The testimony of Weidert himself contradicts the theory that he (Kroll) did, and the theory insisted upon has no sufficient support in the record. On page 32 of the record, Weidert says: "We almost knew it (meaning the land) would fall back to the government and come out forfeited land." Referring to Kroll, Weidert says, he felt confident it would be government land and he could get it for one dollar and twenty-five cents per acre. This is not evidence of a *bona fide* intent to purchase from the railroad company, but from the government. The conclusion reached is that Kroll was not a settler with a view to obtain title to the land from the railroad. He belonged to neither class described in the third section of the act, and as he acquired no right under it, none descended to his heirs. It must be held, however, that Mary Kroll shows no right as a purchaser under said third section of the act.

The fact that John Kroll lived for nearly six months after the passage of the forfeiture act, and took no step to predicate a claim to the land as a purchaser from the railroad, is in harmony with the theory that he did not make settlement with a view to purchasing from the railroad company. When the act of September 29, 1890, took effect, it operated to release the land in question from the withdrawal made for the benefit of the Northern Pacific Railroad Company, and to restore it to the public domain. At that time Kroll and his wife were *bona fide* settlers residing upon the land, and he had a preference right to enter, but failing to do so, the right survived to his widow, and she might so enter it. She did, in fact, make such entry. She is an uneducated woman. She was sixty years old in 1893. She can not write her name. She was obliged to testify through an interpreter. In consequence of a mistake, for which she was not responsible, and by which she should not be injured, she was induced on September 21, 1891, to relinquish

It is, therefore, directed that her homestead entry of March 21, 1891, be reinstated, and that she be allowed to withdraw her said relinquishment thereof. If within a reasonable time she so elects, the cash entry made by her as aforesaid may be treated as a commutation of her reinstated homestead entry, upon proper showing in that behalf, or in default of such election, the cash entry will be canceled, and she will be allowed to perfect her homestead in the regular way.

ENTRY—RIGHT OF AMENDMENT—ADVERSE CLAIM.

The right of a settler to amend his entry so that it shall correspond with his settlement, where by mistake he has misdescribed the land, is not defeated by an intervening adverse claim, if the applicant for the right of amendment shows priority of settlement, due compliance with law, and does not appear by any act of his own to have misled the adverse claimant.

In the above entitled case the Department, on May 14, 1896 (22 L. D., 585), held that Cawood could not be allowed to amend his homestead entry, made September 25, 1891, for the NE. $\frac{1}{4}$ of section 15, T. 15 N., R. 1 E., Guthrie, Oklahoma, land district, so as to take, in lieu of the land above described, the NE. $\frac{1}{4}$ of section 22, same township and range (he having settled upon and intended to enter the latter tract, the entry of the former having been due solely to mistake in description), even though he were the prior settler on the latter tract, for the reason that the latter tract had been entered on September 28, 1891, by Dumas, and to allow the amendment would be to unjustly deprive Dumas of his right to the land in controversy. A motion by Cawood for review was denied on December 23, 1896.

On February 6, 1897, Cawood filed a petition invoking the supervisory authority of the Secretary, wherein he urged that the Department having conceded that he was the prior settler on the land in controversy, and his priority of settlement being also established by the evidence, the Department should have directed the cancellation of Dumas' entry and have allowed the said amendment. The petition was entertained August 23, 1897, and the entertaining order having been complied with, the case comes up again for consideration.

Upon careful examination of the record it is disclosed that the facts stated in the decision of May 14, 1896, *supra*, are substantially correct, except that the tracts above described were not opened to settlement on April 22, but at noon of September 22, 1891, and that Dumas was not aged sixty-four years, but about thirty-three years, at that time. The age of an elderly companion of his in the race, one Franklin, was erroneously given for that of Dumas.

As the result of the hearing between the parties in February, 1893, the local office decided that Cawood was the prior settler on the land in controversy, and, in effect, that the mistake in describing the land was not due to any fault of his, and recommended the cancellation of Dumas' entry and that Cawood be allowed to amend his entry so as to embrace the tract actually settled upon by him. This decision of the local office was affirmed by your office.

The decision of the Department *supra*, reversing your office decision, assumes that the finding of facts, both by your office and the local office, as to the absence of fault on Cawood's part in misdescribing the land, and as to priority of settlement thereon by Cawood, is correct. It is proper to remark in passing, that it is apparent upon the face of the record, that the local officers who heard the witnesses testify were not the same local officers who rendered the decision in the case, and, as urged by counsel for Dumas, your office was therefore in error in giving any weight to the local officers' decision on the ground that they saw and heard the witnesses.

As hereinbefore indicated, the testimony has been now carefully examined. It convinces the Department both that Cawood was the prior settler upon the tract he claims, and that he was not in fault in misdescribing the same. Relative to the misdescription, it appears that Cawood, while hunting the corners of his claim, on the day after the opening, found a witness tree on said section 15, near the northeast corner of the tract he had settled upon. One Smith, in whose company Cawood then was, examined the markings on the tree and told Cawood that these markings showed his claim to be the NE. $\frac{1}{4}$ of said section fifteen. Cawood, being himself an illiterate man, relying upon Smith's statements, went at once to Guthrie to make entry of his claim, and, as already indicated, misdescribed it in his entry papers.

Section 2372 of the Revised Statutes, or, more accurately, the last clause thereof, is cited in said decision as authority for denying Cawood's application to amend his entry. The section provides as follows:

In all cases of an entry hereafter made, of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, where the tract, thus erroneously entered, does not, in quantity, exceed one half-section, and where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or, in case of his death, the legal representatives, not being assignees or transferees, may, in any case coming within the provisions of this section, file his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that

every reasonable precaution and exertion had been used to avoid the error, with the register and receiver of the land district within which such tract of land is situated, who shall transmit the evidence submitted to them in each case, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake has been made, and that every reasonable precaution and exertion had been made to avoid it, is authorized to change the entry, and transfer the payment from the tract erroneously entered, to that intended to be entered, if unsold; but, if sold, to any other tract liable to entry; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry; nor shall anything herein contained affect the right of third persons.

That statute, passed in 1824 (4 Stat., 31), and primarily applicable only to cash entries of public lands, is not, therefore, *in strictissima verba*, applicable to the present case, yet, as was said by the Department in the timber culture case of Christoph Nitschka (7 L. D., 155),

the reason thereof may be appropriately applied to such cases, and . . . a rule similar to that contained in section 2372 of the Revised Statutes relative to mistakes, may properly be and should be applied to timber culture cases, and not only to timber culture cases, but to all classes of claims, to which it is not made specifically applicable by said section of the law.

Circular instructions making a rule similar to that of said section 2372 of general application were issued January 11, 1889 (8 L. D., 187), and are still in force. Such rule, therefore, instead of the express provisions of section 2372, is to be applied to the present case. In connection therewith is also to be applied the third section of the act of May 14, 1880 (21 Stat., 140), which reads:

That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

The purpose of the said rule evidently is to enable one, who, notwithstanding he had used reasonable care to ascertain the true description of the tract he was entitled to enter, had by mistake described another tract, to change his entry to the tract he intended to enter, provided no adverse right had in the meantime attached thereto. So long as Cawood, as the prior settler, duly complied with the law, no adverse right could attach to the land. His application to amend appears to have been made in apt time.

It appearing that Cawood did not intend to enter the land in section fifteen, and that his mistake in the attempt to describe the land he claimed was excusable, he would have been entitled, had he so elected, to have had his entry now of record canceled without prejudice to his right to make another entry. In the absence of a valid adverse claim to the land in controversy, he would, upon such cancellation, be entitled, if duly qualified as a homesteader, to enter that land. If he was

entitled, therefore, to make entry of that land when he made the mistaken entry, he is still entitled to make entry therefor, unless he has forfeited his right to the land by laches, or by some act or representation has so misled Dumas as to raise against himself an estoppel in Dumas' favor. If Cawood had made no entry, the only question in this case would be (1) whether he was the prior settler on the land, and, if he was, (2) whether he had complied with the homestead law since. The first question has already been answered in the affirmative.

When Cawood started for Guthrie on September 23d, as above stated, he left his stake with his flag thereon, a board, on which was written his name, driven in the ground, the stakes which had supported his temporary tent, and his foundation of poles, on the land at the place where he made settlement. Returning to the land September 27, 1891, after making entry therefor, as he supposed, he at once commenced making permanent improvements thereon and continued to reside thereon and improve the same up to the time of the hearing, having moved his family to the claim in October, 1891. At the time of the hearing he had on the claim a house of hewn logs, sixteen by twenty-two feet, a new house, not so large as the other, nearly completed, about thirty acres broken on which he had already raised a crop, a stable, cornerib, and other outbuildings—all valued at about five hundred dollars. It would appear, therefore, relative to the second question, that Cawood had fully complied with the homestead law since his settlement.

It was not necessary that Dumas should have had actual notice of Cawood's settlement when the former attempted to make his settlement, as seems to have been the holding in the decision denying the motion for review in this case, but only that Cawood's acts of settlement were sufficient to have given Dumas notice. In the case of *Trainor v. Stitzel* (7 L.D., 387), cited, it happened that Stitzel had actual notice, and the case was decided according to the facts there. But it does not follow therefrom that the prior settler in any case like the one at bar, must give actual notice of his settlement. Dumas, it appears, was absent from the land from September 25, 1891, until some time in November following. When he returned he found Cawood on the land.

When Cawood, on October 10, 1891, discovered that he had misdescribed the land he claimed, he was prompt to apply to amend his entry, filing application therefor two days afterward. This application was far within the time allowed him by the third section of the act of May 14, 1880, *supra*, to make entry. He did all he could do to rectify his mistake; and it does not appear that Dumas was misled in any way by any act or representation of Cawood.

The cases of *Brown v. West* (3 L. D., 413) and *Callicotte v. Gear* (24 L. D., 135) are directly in point in support of the views herein expressed. It is not deemed necessary to discuss and explain the inapplicability of most of the numerous cases cited by counsel for Dumas. It is suffi-

cient that none of them controvert the conclusion reached in this case. The cases that are applicable are in Cawood's favor.

The decision of May 14, 1896, *supra*, must be recalled and vacated, and the decision of your office in this case affirmed; and it is so ordered.

HOLCOMB v. STATE OF CALIFORNIA.

Motion for review of departmental decision of January 18, 1897 (24 L. D., 26), denied by Acting Secretary Ryan, December 20, 1897.

RAILROAD GRANT—SETTLEMENT CLAIM—ACT OF JUNE 22, 1874.

BIGAREL v. ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

A homestead settler, who by alienation of the land has disqualified himself as an entryman, is not entitled to relief under the act of June 22, 1874, extending the time for the completion of certain railroads in Minnesota, and protecting the rights of settlers prior thereto.

Secretary Bliss to the Commissioner of the General Land Office, December
W. V. D.) 21, 1897. (C. W. P.)

Charles W. Bigarel has appealed from the decision of your office of May 9, 1896, in the case of said Bigarel against the St. Paul, Minneapolis and Manitoba Railway Company, rejecting his homestead application for the NW. $\frac{1}{4}$ of Sec. 35, T. 131 N., R. 14 W., St. Cloud land district, Minnesota.

The record history of the case is stated in your office decision as follows: Said tract is within the twenty miles indemnity limits common to the St. Paul, Minneapolis and Manitoba, main line, and the St. Vincent Extension Railways. It was selected for the St. Vincent grant, November 25, 1873, and certified to the State for said grant April 30, 1874. But this certification was revoked by the Secretary of the Interior, November 14, 1874.

On June 23, 1880, the governor of Minnesota, under the act of the legislature of the State, approved March 1, 1877 (Special Laws of Minnesota, 1877, p. 257), executed a deed of reconveyance to the United States for said land, for the benefit of Charles W. Bigarel.

On April 3, 1883, your office having no knowledge respecting the reconveyance of the land for Bigarel's benefit, again listed the land for the purpose of the railway grant. The listing was re-approved by the Secretary of the Interior April 3, 1883, and patent was issued thereon April 23, 1883, for the benefit of the St. Vincent Extension Railway Company, and the same was conveyed by the State to the said company, May 9, 1883.

On October 16, 1889, Charles W. Bigarel's application to make home-

stead entry for the said tract was rejected by the local officers, because of conflict with said company's claim; and he appealed to your office.

Accompanying the application of Bigarel to make homestead entry is the evidence submitted by him to the State Board in 1879, in support of his application for the relief afforded by the State law of 1877, from which it appears that he settled on the said land in 1873, and has been continuously residing thereon from that time, and your office held that Bigarel is entitled to relief under the act of June 22, 1874 (18 Stat., 203), providing for an extension of time for the completion of said St. Vincent Extension and other railway lines in Minnesota, and cited the cases of *Tronnes v. St. Paul, Minneapolis and Manitoba Railway Company* (18 L. D., 201), and *Ellingson v. the same* (21 L. D., 254).

On June 6, 1894, Bigarel's case was examined by your office, and it appearing that the railway company was not present or represented at the time, he submitted his proof before the State Board, and in order that all parties might be heard in the matter, the local officers were directed to order a hearing, with notice to Bigarel and the railway company of the time and place for the same, for the purpose of ascertaining the precise condition of said NW. $\frac{1}{4}$, Sec. 35, T. 131 N., R. 44 W., as to occupancy and residence by Bigarel at and subsequent to said act approved June 22, 1874.

A hearing was had, September 20, 1894, all parties in interest being present; and, upon the testimony taken, the local officers decided that Bigarel should be allowed to enter the land; from which the company appealed to your office.

The testimony shows that Bigarel is a citizen of the United States, and a qualified homestead claimant; that he settled on this land in June, 1873, and continued to reside thereon and cultivate a crop every season until 1889, when he made application to enter the land under the homestead law, and initiated the present contest.

It appearing that Bigarel was a settler on the land June 22, 1874, the date of the act extending the time for the completion of the said road (18 Stat., 203), your office held that his rights as an actual settler were saved and secured thereunder, the same as if said land had never been granted to aid in the construction of said railroad.

The time within which the said road should have been built under the granting act, and the extension of June 22, 1874, expired March 3, 1876. The road not having been completed, the State of Minnesota, by act of its legislature, dated March 1, 1877, extended the time on condition that the company or corporation taking the benefits thereof should not acquire, directly or indirectly, any right, title, interest, claim or demand in or to any tract or parcel of land within its granted or indemnity limits, to which legal and full title had not been perfected in said company or its successors or assigns.

At the date of this act, the land in question had not been patented to the State, and Bigarel having shown to the satisfaction of the State

Board of Commissioners that he had been an actual settler on the land since June, 183, the governor made the deed of relinquishment, in his favor, as aforesaid. But Bigarel did not make his homestead application for the land until October, 1889. In the meantime, it had been approved and patented to the State, and by the State to the railroad company. And by papers filed at the hearing, it is shown that Bigarel purchased the tract in question, and the NE. $\frac{1}{4}$ of said Sec. 35, T. 131 N., R. 44 W., from the railroad company, October 4, 1883, and received a deed for the same. And on April 22, 1892, he and his wife transferred the land by warranty deed to one E. J. Webber, who is now in possession of the same. Your office held that

Bigarel, by his alienation of the land by sale to Webber, whatever right he hitherto may have had under his homestead claim, disqualified himself as a homestead claimant under sections 2290 and 2291 of the Revised Statutes, and forfeited his right to relief under the act of June 22, 1874; that the sale to Webber being a direct and absolute alienation of the land, disqualified him from making the affidavits required under the sections of the Revised Statutes referred to.

And his application to make homestead entry for the said NW. $\frac{1}{4}$ of Sec. 35, T. 131 N., R. 44 W., was rejected by your office decision.

There appears to be no error in the decision of your office.

By the act of June 22, 1874, *supra*, the time for the completion of the road was extended, upon the following conditions:

That all rights of actual settlers and their grantees who have heretofore in good faith entered upon and actually resided on any of said lands prior to the passage of this act, or who otherwise have legal rights in any of such lands, shall be saved and secured to such settlers or such other persons in all respects the same as if said lands had never been granted to aid in the construction of the said lines of railroad.

The deed to Webber is a warranty deed from Charles W. Bigarel and wife to E. J. Webber. In explanation of the deed, Bigarel testified that he went to Webber and told him of the existence of a mortgage on the land and of certain other debts; and asked him to step in and help him lift the indebtedness; that Webber took the matter under consideration and finally proposed that Bigarel should give him (Webber) a deed of the land, and that he (Webber) and wife would give Bigarel a contract to reconvey to him one half the property when the indebtedness was paid; that he accepted said proposal; conveyed the land to Webber and received from the latter a contract for the reconveyance of one half of the land when the indebtedness was paid; that he (Bigarel) went east during the following spring, with the intention of raising money to buy Webber out; that while there he traded his contract to one Thayer, and that Webber subsequently bought the contract from Thayer for little or nothing.

It thus appears from Bigarel's own statement that the absolute title to the land is now in Webber, as he not only holds Bigarel's deed, but also the contract given by him to Bigarel. The amount of the consideration passing from Webber to Thayer is of no consequence to Bigarel, for by his own testimony he traded the contract to Thayer, and

he does not claim that he did not receive value, or that there was any collusion between Webber and Thayer.

It is held in the case of *Crawford v. Furguson*, 10 L. D., 274, that the sale of an undivided half interest of the land covered by a homestead entry prior to final proof renders the homesteader incompetent to perfect his entry, and that the defect can not be cured by a reconveyance in the presence of an intervening contest charging incompetency.

The decision of your office is therefore affirmed.

PRACTICE—NOTICE—REVIEW—DESERT LAND CONTEST.

VRADENBURG'S HEIRS ET AL. *v.* ORR ET AL.

(ON REVIEW.)

A mere docket entry of notice by registered letter is not evidence that service of a notice of decision was in fact so made.

Evidence not newly discovered comes too late when offered for the first time on motion for review.

A contest against a desert land entry on the ground of non-reclamation is premature, if the entry in question was at one time suspended, and the statutory life of the entry has not expired exclusive of the period of suspension.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 21, 1897. (C. W. P.)

By letter of November 30, 1897, your office transmitted a motion by Hiram L. Waits, John L. Wasson, Teresa Parero, W. B. Timmons, and James Herington, for review of departmental decision of October 12, 1897, in the case of Heirs of L. C. Vradenburg *et al.* against T. B. Orr, entryman, and Emile Chauvin, transferee (25 L. D., 323); and on the same day you transmitted a separate motion for review of said decision, on the part of Thomas E. Taggart. The land involved is Sec. 10, T. 25 S., R. 25 E., Visalia land district, California.

The motion for review, on the part of Waits and others, contains ten specifications of error; but it is unnecessary to consider any of these specifications (with the exception of the first and second specifications), as no questions in the case are presented by them which were not fully considered by the Department when the case was decided upon the merits. In such cases motions for review are denied. *Shields v. McDonald*, 18 L. D., 478, and cases cited.

It is alleged, in substance, in the first and second assignments of error, that the Department erred in not finding from the official records, to wit, a certified copy of the entries on the contest docket of the land office at Visalia, which was filed with their joint appeal from your office decision of April 9, 1897, that the defendant Orr was served with due notice of the departmental order of January 12, 1891, revoking the suspension ordered by the Department on September 12, 1877, by registered letters, dated May 22, 1891, and August 6, 1891.

In the cases cited in the decision complained of, it was held that on the revocation of an order suspending a desert entry time will not run against the entryman in the matter of reclamation, in the absence of notice of the revocation sent to him by registered mail, and in the decision of which a review is asked it is held that, it not appearing from the record that due notice of the order of revocation was sent to the entryman Orr, the contests of these petitioners were prematurely brought and their contests were dismissed.

The docket entries of May 22, 1891, and August 6, 1891, are as follows:

"H" of April 29, 1891, decides in favor of contestant and holds entry for cancellation. Parties notified. May 22, 1891 (C. L. B.).

"H" of July 30, 1891, revokes the decision of April 29, 1891 ("H"), holding entry for cancellation. Reg. notice to parties, Aug. 6, 1891 (C. L. B.).

It will be seen that the first entry does not even attempt to state how the "Parties" were notified, and although the second entry states that there was "Reg. notice to parties," the mere docket entry of notice to parties by registered letter is not evidence of the fact. Rule 18 of practice requires that

proof of service by mail shall be the affidavit of the person who mailed the notice attached to the post office receipt for the registered letter.

Conscious of the weakness of his contention that the record shows that the entryman had received due notice of the revocation of the suspension, the counsel for the petitioners has filed with the motion for review *ex parte* affidavits to show that Orr did, in fact, receive notice by registered letters of the decisions of your office of April 29, 1891, and July 30, 1891, and talked to several persons about the decision of April 29, 1891; and that from a perusal of said decision he was apprised of the revocation of the order of suspension. It is thus attempted by means of *ex parte* affidavits, executed since the decision of the case by the Department, to prove that the Department was in error in deciding that the record before it did not show that Orr had received notice of the revocation of the suspension of his entry, in accordance with the requirements of *Farnell et al. v. Brown*, on review, 21 L. D., 394; *White v. Dodge*, Id., 494, and *Roscoe et al. v. Foster et al.*, 24 L. D., 435, cited in the decision complained of.

But the evidence is in no sense newly discovered. It is stated in the motion that "the facts contained in these affidavits were unknown to" the counsel for the petitioners "until November 20, 1891," but it is not stated that the facts were not known to him or to the petitioners prior to the trial, and evidence not newly discovered comes too late when offered for the first time on motion for review. *Hilliard on New Trials*, p. 495; *Cline v. Daul*, 11 L. D., 565; *Guthrie Townsite v. Paine et al.* (on review), 13 L. D., 562; *Long Jim et al. v. Robinson et al.* (on review), 17 L. D., 348.

The motion is therefore denied.

As to Thomas E. Taggart, no questions are presented for consideration in his motion for review which were not duly considered by the Department when the case was decided on the merits, except in the second specification of error. But some remarks will be made upon the first assignment of error, in which it is alleged that the Department erred:

By overlooking the fact that his contest was not rejected by the local officers or excepted to by the entryman or his assignee on the ground of prematurity of charge of non-reclamation, and, in the face of authorities such as *Hague v. Gillard et al.* (21 L. D., 467), failing to count to April 22nd, 1895, the date of citation, and holding that such charge was prematurely made.

The record shows that on July 22, 1887, Taggart filed a contest affidavit against Orr's entry, in which it is alleged that the entryman has not reclaimed the land nor any part of it. This contest affidavit was rejected by the local officers "on the ground that said entry was suspended in 1877." Taggart appealed to your office. Your office forwarded the affidavit of contest to the Department, with the record in the appeal of Vradenburg (see *Vradenburg v. Orr*, 16 L. D., 35). Upon the decision by the Department in said case, reported in 16 L. D., 35, your office ordered a hearing, notifying all parties, including Taggart. At the hearing Taggart appeared, in person and by attorney, and it appearing that, on February 18, 1891, during the pendency of his appeal, he had filed an affidavit of contest, in which he charges that the land is non-desert in character, has not been reclaimed, and that there is fraud in the filing of said entry, he was heard upon this affidavit of contest. The local officers held that the charge of the non-desert character of the land was not supported by the evidence; that there was no evidence to support the charge of fraud, and that the charge of non-reclamation is premature and the evidence introduced to prove that the land had not been reclaimed was irrelevant, and had not been considered by them, because Taggart's affidavit of contest was filed February 18, 1891, at which date three years from the date of the entry, exclusive of the period of suspension, had not elapsed, the entry being suspended September 28, 1877, and the suspension revoked February 10, 1891, and recommended that the contest be dismissed. Your office affirmed the decision of the local officers and the Department affirmed the decision of your office.

At the date of the filing of Taggart's affidavit of contest, although the Department had ordered the revocation of the suspension of Orr's entry, no notice thereof had been served upon the entryman, and it is clear that Taggart's affidavit of contest, so far as it charged a failure to reclaim the land within the time allowed by law, failed to state facts sufficient to constitute a cause of action, and there was no error in the decisions so holding.

In the case of *Brunette v. Phillips*, 22 L. D., 692, Phillips's entry was suspended by your office during an investigation of Brunette's claim to

the land. Before Phillips had been informed of the revocation of the suspension, Brunette filed an affidavit of contest, alleging abandonment, change of residence for more than six months after entry. Upon a hearing had the local officers recommended that notwithstanding that Phillips's entry had not been relieved from suspension six months before the initiation of the contest, it should be canceled and Brunette permitted to enter the land. Your office affirmed this judgment. But on further appeal, the Department reversed your office decision and held that the contest having been initiated prior to the expiration of six months from the date of entry, not counting the period of suspension, was premature. See also Farnell *et al. v. Brown*, on review, White *v. Dodge*, and Roscoe *et al. v. Foster et al (supra)*.

In Taggart's second specification of error it is alleged, that it was error to hold that the record does not show that the entryman Orr had been served with notice of the revocation of the suspension of his entry, when the record does show a receipt which was signed by him not later than May 22nd, 1891, for a registered letter from the local officers containing a copy of the decision of the Commissioner of the General Land Office, dated April 29th, 1891, referring to said revocation.

If it were admitted that the record does show these facts, Taggart would obtain no benefit from such admission. But the record does *not* show that a copy of your office decision of April 29, 1891, was served on the entryman.

The motion for review is accordingly denied.

RAILROAD GRANT—INDEMNITY—CONFLICTING GRANTS.

NORTHERN PACIFIC R. R Co.

As to lands lying within the granted limits of the Northern Pacific grant, and also within the additional indemnity limits of the Lake Superior and Mississippi road provided for in the act of July 13, 1866, the right of the latter company is defeated by the grant and location of the Northern Pacific made prior to selection on behalf of the Lake Superior and Mississippi road; but, if lands occupying such status are erroneously patented to the latter company, indemnity therefor cannot be allowed the Northern Pacific as the lands so patented must be charged to its grant.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 21, 1897. (F. W. C.)

List No. 19, of selections made on account of the grant for the Northern Pacific Railroad Company, covering 1,250.20 acres within the second indemnity belt, provision for which was made by the joint resolution of May 31, 1870 (16 Stat., 378), is again before this department for consideration.

The list was first submitted with your office letter of October 7, 1896, but was returned without approval by departmental letter of November 17, 1896 (24 L. D., 320).

In said letter it was stated:

In considering the question as to the proper establishment of the terminal of the Northern Pacific grant at Duluth, it was held in departmental decision of October 29, 1896 (23 L. D., 428), that the Northern Pacific Railroad Company will not be entitled to indemnity for any lands received by the Lake Superior and Mississippi River Railroad Company opposite the portion of the road between Thomson and Duluth. In referring to that part of the act of July 2, 1864, *supra*, wherein it is provided 'that if said route shall be found upon the line of any other railroad route to aid in the construction of which lands have heretofore been granted by the United States, as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act,' it was held that the intention of Congress evidently was to provide against making a double grant where two land grant railroads were found to be upon the same general line, and this can only be arrived at by charging to the Northern Pacific all lands received by the company to which the first grant was made, opposite the portion of the lines which are similar, whether within the primary or indemnity limits of that grant.

It is clear therefore that the basis as assigned in the list submitted for the approval of this Department is not a satisfactory basis, and the list is herewith returned without my approval.

It now appears that resident counsel for the company, in letter of December 11, 1896, requested that the list be again submitted and in said letter urge that—

It is evident that the Secretary's attention was not called to the true facts in the case. The lands patented to the Lake Superior and Mississippi road were not within its grant of May 5, 1864, as stated. They fell within the enlarged limits of the grant under the act of July 13, 1866, and form no part of the grant considered by the Department in its eastern terminal decision.

In said decision it was held that Congress in the grant of July 2, 1864, to the Northern Pacific road, expressly provided—

'That if said route shall be found upon the line of any other railroad route, to aid in the construction of which lands have been heretofore granted by the U. S. as far as the routes are upon the same general line, the amount of land heretofore granted shall be deducted from the amount granted by this act,' and the Northern Pacific road from Thomson Junction to Duluth having fallen upon the line of road of the Lake Superior and Mississippi Company for which a grant had been made May 5, 1864, such lands falling within the grant of 1864 should be deducted from the Northern Pacific grant.

The present lands do not fall within said class. They were not within the grant of May 5, 1864, but within the grant of July 13, 1866. They had not therefore 'been heretofore granted,' when the Northern Pacific act was passed; and being patented to the L. S. & M. road form a proper basis for the indemnity selection of the Northern Pacific road of lands within its second indemnity belt. In view of these facts we request that said list 19, may be resubmitted to the Secretary with this communication in order that said list may be approved.

In resubmitting the list your office letter states—

That the grant to the State of Minnesota, to aid in the construction of the road known as the Lake Superior and Mississippi River Railroad, was of 'every alternate section of public land . . . to the amount of five alternate sections per mile on each side of the railroad,' with a provision for indemnity for losses within the grant in place to be taken within an adjacent territory not more than twenty miles from the road line.

The limits of the grant, therefore, when established after the location of the line of the road, were a ten mile primary limit and a twenty mile secondary or indem-

nity limit. The lands given as bases for these indemnity selections were not within either of these belts. But, after the location of the general route of the road, it became apparent, the grant being confined to the State of Minnesota, that by reason of the proximity of the road to the boundary line of the State, the amount of land intended to be granted by the act of 1864, could not be found within the limits prescribed therein, and Congress by act of July 13, 1866 (14 Stat., 93), gave the company the right to select land within thirty miles on the west side of the road, to make up any deficiency that might be found to exist; and it is within this thirty mile belt that the tracts given as bases aforesaid, are situated. They are also situated opposite that portion of the road between Thomson Junction and Duluth, used by the two companies under the agreement aforesaid.

Therefore, it is clear that these lands were not within the grant of 1864, but were granted by the act of 1866.

Now, the grant of 1866, was subsequent to the Northern Pacific grant, but the withdrawal thereunder, made by letter of November 2, received at local office November 17, 1866, was prior to the withdrawal on general route for and the definite location of said Northern Pacific grant, which were August 13, 1870, and November 20, 1871, respectively.

However, in the treatment of the similar case of the overlap of the Northern Pacific and the Oregon and California grants, it was held (14 L. D., 187), that the Northern Pacific being the prior grant, although the line of its road had not been definitely located but a map of general route only had been filed, and that, subsequent to the grant and definite location of the Oregon and California grant, had the superior right. See also the decision of the supreme court in *St. Paul and Pacific v. Northern Pacific Company* (139 U. S., 1), where a similar conflict was settled.

Now, if it should be determined that the right of the Northern Pacific Company within this thirty mile indemnity belt, established under the grant of July 13, 1866, is superior to that of the Lake Superior and Mississippi Company, and that the patenting of the lands therein to the latter company was erroneous, must not these lands be charged against the grant to the Northern Pacific Company, notwithstanding the erroneous patent to the Lake Superior and Mississippi Company? *Chicago, St. Paul, Minneapolis and Omaha Railway Company* (6 L. D., 195, 209), *Atchison, Topeka and Santa Fe R. R. Co.* (21 L. D., 49). If so, then they do not form a proper basis for indemnity.

The grant to aid in the construction of the Northern Pacific Railroad was made by the act of July 2, 1864 (14 Stat., 365).

As located and constructed, the lands made the bases for the selections under consideration, fall within the primary or granted limits, and the grant of 1864 being one *in praesenti*, as against the grant made by the act of July 13, 1866 (14 Stat., 93), the act of 1864 would take precedence. See *St. Paul and Pacific v. Northern Pacific* (139 U. S., 1), and cases therein cited.

The act of 1866 amended the act of May 5, 1864, making the grant for the St. Paul and Duluth Railroad, but no right to any specific lands capable of identification was granted, so that, if the amendment be given effect as of the passage of the act of May 5, 1864, no rights attached within the limit provided for in the act of 1866 until selection, which was long subsequent to the grant and the location of the Northern Pacific Railroad.

The act of 1866 provides as follows:

Be it enacted, etc., That section one of the act entitled 'An act making a grant of lands to the State of Minnesota to aid in the construction of the railroad from Saint Paul to Lake Superior,' approved May fifth, eighteen hundred and sixty-four, be

amended by adding thereto the following: "*Provided, further, That in case it shall appear, when the line of the Lake Superior and Mississippi Railroad is definitely located, that the quantity of land intended to be granted by the said act in aid of the construction of the said road shall be deficient by reason of the line thereof running near the boundary line of the said State of Minnesota, the said company shall be entitled to take from other public lands of the United States within thirty miles of the west line of said road such an amount of lands as shall make up such deficiency: Provided, That the same shall be taken in alternate odd sections as provided for in said act. (a)*"

A similar question was considered by the supreme court in the case of *Kansas Pacific v. Atchison R. R.* (112 U. S., 414-421). In that case the lands in controversy were within the twenty mile or enlarged granted limit of the grant for the first mentioned road, provided for in the act of July 2, 1864, and within the indemnity limits of the grant for the Atchison company under the act of March 3, 1863, and in the consideration of the case it is stated in the opinion—

The question, therefore, for determination is, whether the grant to Kansas, by the act of Congress of March 3, 1863, covered the title to these indemnity lands. We are clear that it did not. It granted only alternate sections, designated by odd numbers, within the limit of ten miles, and from them certain portions were to be selected from adjacent lands, if any then remained, to which no other valid claims had originated. But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government, subject to its disposal at its pleasure. The grant to the Kansas Pacific Company, by the act of 1862, carried the odd sections within the limit of ten miles from its road, and by the act of 1864 such sections within the limit of twenty miles. The act of 1862 is to be construed, as already said, as though the larger number were originally inserted in it, and, with the exceptions stated, it must be held to pass the title to the grantee as against the United States, and against all persons not having acquired that title previous to the amendment.

It seems to me clear, therefore, that error was committed in patenting the lands, made the bases for the selections under consideration, on account of the grant for the St. Paul, and Duluth Railroad; this being so, there is no provision of law permitting the selection of indemnity on account thereof, and for this additional reason the list submitted is again returned without approval. *Atchison, Topeka and Santa Fé R. R. Co.* (21 L. D., 49).

BENJAMIN v. EUDAILY.

Petition for reconsideration denied December 22, 1897, by Secretary Bliss. See departmental decision of August 5, 1897, 25 L. D., 103.

RIGHT OF WAY—ADDITIONAL GROUNDS.

UNION PACIFIC RY. CO.

The grant of the right of way to the Union Pacific Ry. Co. by section 2, act of July 1, 1862, may extend beyond two hundred feet on either side of the road, where the land is desired for the uses specified in the act, and the necessity for the use is made to appear.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 22, 1897. (F. W. C.)

The Union Pacific Railway Company has appealed from the action taken in your office letter "F" of June 8, 1896, in rejecting certain applications for additional lands submitted for approval under the claimed right of way granted by the second section of the act of July 1, 1862 (12 Stat., 489).

Said office letter states as follows:

These plats represent tracts adjoining the right of way of two hundred feet from the central line of the company's road, and the tracts extend 726, 715 and 871.2 feet, respectively, from the limit of the right of way.

The language of section 2 of said act of July 1, 1862, is as follows:

"That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stones, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for stations, buildings, workshops, and depots, machine shops, switches, side tracks, turntables, and water stations.

"The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made."

The terms of this grant are different from most of the other grants of right of way by Congress, which more frequently provide for a right of way to the extent of one hundred feet or less on each side of the central line of the road, and also ground adjacent thereto, for station purposes, not to exceed in amount twenty acres for each station, and one station for each ten miles of road.

The terms of the grant to the Union Pacific R. R. Co., are of a right of way to the extent of two hundred feet on each side of the road *including* all necessary grounds for stations, buildings, etc.

I am of the opinion, therefore, that there is no authority of law for this proposed extension of the grant of right of way for station purposes, to cover public land outside the two hundred foot strip of right of way on either side of the road.

Furthermore, the road has been constructed nearly thirty years, and, so far as its right of way is concerned, the company has availed itself of the privileges of the grant, fulfilled its requirements, filed its maps of definite location, and as to that portion of its grant no further approval is required (18 L. D., 510).

The plats are accordingly rejected, etc.

The question raised by the appeal is whether the language of the grant of right of way restricts the entire grant to two hundred feet on each side of the road.

It will be noted that the grant to the extent of two hundred feet on

each side of the road is without condition, and is not made dependent upon proof of any necessity for the use of that amount. To that extent a right of way is granted without regard to the uses to which it may be applied. If it was intended to confine the grant for right of way to this two hundred feet on each side, there was no occasion to say anything more.

Following the general grant of right of way are the words, "including *all necessary* grounds for stations, buildings," etc. If these words do not apply to necessary grounds outside of the two hundred feet then they are meaningless and were used by Congress without purpose. Established rules of construction do not permit words, phrases and sentences to be thus discarded where they can be reasonably given an effect and meaning consistent with their use and presence in the statute.

To the extent of two hundred feet, as before stated, proof of the necessity for the use of the land can not be exacted; therefore, the portion of the statute which depends for its application upon the necessity for using the lands for certain specified purposes, can not refer to the same lands which are thus unconditionally granted without regard to any specified necessity therefor.

In the case of the Union Pacific Railway Company (3 L. D., 587), it was held that (syllabus):

An application for additional lands under section 2 of the act of July 1, 1862, should be accompanied by an explicit showing as to the necessity of such land to the company in the operation of its road.

This is a clear recognition of the construction above made.

Upon inquiry at your office it is learned that this company filed altogether six station plats, all of which are in Wyoming. Three of them, viz., stations at Cheyenne, Laramie and Evanston, were sent to the Department, by Sidney Dillon, on January 6, 1875, and by the Department referred to your office on January 16, 1875, "for appropriate action." These station grounds covered tracts more than two hundred feet from the line of road. On February 8, 1875, copies were sent by your office to the local land office at Cheyenne, Wyoming, with instructions to file the same and to inform parties seeking entry of the land that title could be acquired only

to the fee subject to the use of the company, except a claim be founded upon a right of settlement prior to the occupation for railroad purposes.

Subsequently the company's attorney filed in your office three other station plats, showing grounds to be occupied more than two hundred feet from the line of road, viz., at Medicine Bow, Green River and Rawlins. By letter of your office to the land office at Cheyenne, Wyoming, dated March 20, 1876, copies of the first two plats were transmitted, holding that it was

proper to allow the plats to be filed as notice to all parties seeking to enter the lands . . . leaving the adjustment of conflicting interests thereafter to the proper jurisdiction of the judicial tribunals,

and that the tracts were to be disposed of subject to such rights as the company acquire under the law. On March 22, 1876, your office transmitted a copy of the third plat to the local land office, instructing the officers that the tracts involved "will be disposed of subject to such rights as the company acquire under the law."

While none of these maps appear to have been formally approved by this Department, yet the practical construction of the statute thereby made is in harmony with the views here expressed.

It is accordingly held that the grant of the right of way by the act under consideration may extend beyond two hundred feet on either side of the road, where the land is desired for the uses specified in the act and the necessity for the use is made to appear.

The action of your office in rejecting the applications is set aside and they are herewith returned for further examination in the light of the construction of the statute herein made.

RAILROAD GRANT-INDEMNITY SELECTION-SETTLEMENT CLAIM.

BANKS v. NORTHERN PACIFIC R. R. CO.

A claim of occupancy, set up to defeat the right of indemnity selection, can not be recognized, if it appears that at the date of selection the alleged occupant had not established residence on the tract, but was maintaining a home elsewhere in the prosecution of a claim under the pre-emption law.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 24, 1897. (P. J. C.)

The land involved in this appeal is the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 19, T. 5 S., R. 4 W., Helena, Montana, land district, and is within the fifty-mile indemnity limits of the grant to the Northern Pacific Railroad company. It was selected by the company July 2, 1885, per list No. 7, but the selection has not been approved.

On March 18, 1895, Nicholas Banks filed his corroborated affidavit alleging that he had been in possession of said land since 1878; had made improvements thereon by fencing and cultivating the same and erected some buildings; that he did not know the land had been selected by the company and that he had "always intended to make application for title to said lands."

Your office ordered a hearing. The testimony was taken before a United States commissioner and on examination thereof the local officers found that the land was in possession of Banks on July 2, 1885; that it was fenced and that he had under cultivation about thirty-five acres; that it was supplied with water for irrigation and had been in Banks's possession since 1878. The local officers recommended that the selection of the railroad company be canceled to the extent of the land involved and that Banks be permitted to make entry thereof.

On appeal your office affirmed the action of the local officers; whereupon the railroad company prosecutes this appeal, assigning error in holding "that at the date of the company's selection this land was in the occupancy of a qualified entryman intending to acquire title to the same under the settlement laws;" in not holding "that at the date of the company's selection Nicholas Banks was prosecuting a pre-emption claim for other land;" and that "it was error to hold that Banks was asserting any claim to this land at the date of the company's selection."

It appears from the testimony that one Brundy owned one hundred and twenty acres of land adjoining that in controversy and that he had included a part of this land in his enclosure and cultivated some of it; that in 1878 Banks became possessed of a mortgage that Brundy had given on his claim and that Banks foreclosed this mortgage.

It is not shown by the testimony whether the land in controversy was included in Brundy's mortgage or not, but it is safe to assume that it was not for the reason that he had no title to it.

It appears that Banks took possession of the land he thus bought from Brundy and lived in the house that Brundy had on his land. It is shown that during the years 1881-1882- and 1883, Banks did not live in this house or on the land in controversy, but had leased it and the same was in charge of a tenant; that from 1883 to 1891 he was living some distance away from the tract in controversy holding a pre-emption claim of which he made entry February 28, 1889. Notwithstanding Banks's absence from the land during this long period of time he still insists that he was residing upon the land and in explanation of this says that he had two homes. He doubtless at times stopped upon the land in controversy but it is shown by the testimony that he never resided upon the same until he built a house thereon in 1895.

Under these circumstances, it can hardly be said that Banks had such claim to this land at the date of the selection as would defeat the company's right to it under its grant. In *Northern Pacific Railroad Co. v. Tripp* (19 L. D., 516), it was held:

It is well established by the repeated rulings of this Department that a person can not maintain two claims arising under the settlement laws at one and the same time, and while a person attempting to hold two such claims might abandon one or the other, and thus legalize his claim to the tract reclaimed, the nature of his claim asserted at any given time must be arrived at by a consideration of the facts proven in each given case.

It is admitted by Banks that he had never resided upon the land in controversy prior to the date of the railroad company's selection, also that at that particular date he was holding other land under the pre-emption law. Hence, he will come clearly under the rule quoted above.

Your office decision is therefore reversed.

HOMESTEAD CONTEST—COMPLIANCE WITH LAW BY HEIRS.

COLYER *v.* BEACH'S HEIRS.

In determining whether the heir of a homesteader has shown due compliance with law, in the matter of cultivation and improvement of the land, the means at the command of such heir, his good faith, and the fact that such compliance with law had been resumed prior to the initiation of the contest are all entitled to receive due consideration.

Secretary Bliss to the Commissioner of the General Land Office, December 24, 1897. (H. G.)
(W. V. D.)

On August 16, 1895, George Colyer filed his affidavit of contest against the heirs of Charles A. Beach, deceased, alleging, in substance, that on January 22, 1891, during the lifetime of said decedent, he made homestead entry for the SE. $\frac{1}{4}$ of Sec. 6, T. 44 N., R. 4 W., in the Ashland, Wisconsin, land district, that said entryman died in August, 1892, and that his heirs abandoned said tract for more than six months, and had wholly failed to cultivate the same for that period.

Notice by publication was given, and the hearing was had before the local officers, who recommended the dismissal of the contest, and upon appeal to your office, on June 4, 1896, their decision was affirmed and the contest was dismissed.

Colyer, the contestant, appeals.

The entryman died in August, 1892, leaving as his sole heir, his mother, Mrs. Margaret Royston, who resides in Holton, Michigan, and who appeared as defendant in the contest proceedings. Since her son's death she has expended sixty-two dollars in the improvement of the claim, of which sum twenty dollars were used in the year 1893 and fifteen dollars in the year 1895, nothing having been expended in the year 1894, owing doubtless to the removal of the agent of Mrs. Royston who had disbursed these moneys. The sum forwarded in 1895 was expended prior to the initiation of the contest. These small sums were forwarded annually with the exception of the year 1894, to parties residing in the locality, for the purpose of cultivating the tract, as Mrs. Royston, the heir, resided in another State, and some distance from the land. No proper equivalent was rendered in labor on the tract for these moneys but this was the act of the agents of Mrs. Royston and not her fault. She states that the land officers informed her that she need not have any more "chopping" done, but must keep up the improvements on the tract. The cultivation consisted of planting a small clearing of about two acres in timothy and a few potatoes. No attempt was made to harvest the crops, and they seem to have been put in for the purpose of a technical compliance with the law and to render as little service as possible in return for the sums received for cultivating the cleared portion of the tract. The cultivation contemplated by

section 2291 of the Revised Statutes is undoubtedly the preparation and use of the soil for agricultural purposes, whereby the land is reclaimed from its wild state and made productive. (John T. Wooten, 5 L. D., 389.) If the moneys advanced by Mrs. Royston had been devoted to clearing the land of timber, such action on her part would have been considered as cultivation of the tract. (John E. Tyrl, 3 L. D., 49.) The land officers informed her that this was not necessary, and while the government is not concluded or estopped by such advice, nevertheless, where a claimant acts upon it, it tends to show good faith on his or her part. (Ard v. Brandon, 156 U. S., 537, 543.) Indeed, the record shows that Mrs. Royston from her limited means honestly endeavored to comply with the law, and in view of her manifest good faith, and the fact that she resumed cultivation and improvement of the tract before the initiation of the contest, her entry will not be disturbed.

The decision of your office in dismissing the contest is affirmed.

RAILROAD GRANT—ACT OF AUGUST 5, 1892.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The occupancy of town lots under a scrip location should not be held such an adverse right, or claim, as will defeat the right of selection under the act of August 5, 1892, where at the date of such selection the scrip has been withdrawn, and the occupants and purchasers thereunder disclaim any interest adverse to the company.

Secretary Bliss to the Commissioner of the General Land Office, December
(W. V. D.) 24, 1897. (F. W. C.)

With your office letter of May 18, 1897, was forwarded the record in the matter of the appeal of the St. Paul, Minneapolis and Manitoba Railway Company from your office decision of February 8, 1897, holding for cancellation its selection under the provisions of the act of August 5, 1892 (27 Stat., 390), covering the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 24, T. 154 N., R. 101 W., Minot land district, North Dakota.

This township was surveyed in the field between August 28, and September 27, 1892, and the township plat was approved by the surveyor general December 8, 1892.

On December 31, 1892, the company selected this land as an unsurveyed tract, per its indemnity list No. 1, made under the act of August 5, 1892, *supra*, the township plat not having been filed in the local office at that time, and on March 2, 1893, filed a new list, describing the tracts by legal subdivisions according to the plat of survey which had in the meantime been filed.

By your office letter of March 5, 1894, said list was forwarded with favorable recommendation for the approval of this Department as a basis for the issue of patent to the company. As the township plat

showed that the town of Williston was located on this land, and the field notes stated that there are about one hundred and fifty people residing in said town, by letter of March 21, 1894, the list was returned to your office, for the reason that

the record shows, *prima facie*, a claim adverse to that of the company, antedating its selection, and I am of the opinion that this list should not be approved until it is shown that such occupants have no rights in the premises. I must therefore refuse to approve the list as submitted without further showing on the part of the company as to the rights of these adverse occupants shown to be upon the land by the return of the surveyor.

Acting thereunder, the company, on December 20, 1894, forwarded the resolution adopted by the board of trustees of the town of Williston on the 17th of November, 1894, in accordance with resolutions adopted at a mass meeting, called for the purpose, at which resolutions were adopted authorizing the trustees of the town to waive and disclaim any interest in the premises.

The resolutions are as follows:

We, the undersigned president and clerk of the board of trustees of the town of Williston, in the county of Williams and State of North Dakota, hereby certify that the following resolutions were, on the 17th day of November, A. D. 1894, adopted by said board of trustees of said town of Williston, viz:

Whereas, the tract of land described as follows, to wit: the south $\frac{1}{2}$ of the north-west $\frac{1}{2}$ and the north $\frac{1}{2}$ of the southwest $\frac{1}{4}$ of section 24, in township 154 north of range 101 west, in Williams county, North Dakota, was located with Valentine scrip in June, 1887, and the tract so located was laid out and platted into the town of Williston, and

Whereas, nearly all the residents of said town of Williston hold their lots under contract with said locators, and

Whereas, the said Valentine scrip was withdrawn on December 20th, 1892, and the said tract selected by the St. Paul, Minneapolis and Manitoba Railway Company the same day, under act of August 5th, 1892, and

Whereas, the said railway company has undertaken to carry out the contracts for the sale of lots of said locators, and

Whereas, the delay in the issuance of the patent for said tract is a great hardship to the residents of said town of Williston, therefore be it

Resolved, by the board of trustees of said town of Williston, that the said town of Williston has no interest in, or claim or right to the said tract, either directly or indirectly, of any kind or nature whatsoever,

Resolved, that the town of Williston never claimed said tract of land or any portion of it, by reason of said town being located upon said tract, or for any other reason whatsoever,

Resolved, that it is within the knowledge of this board of trustees that nobody except the said St. Paul, Minneapolis and Manitoba Railway Company, or its assigns, has any interest in, or claim or right to, said tract, or any portion thereof, and

Resolved, that a copy of these resolutions, certified to by the president and clerk of the board of trustees of said town of Williston, be forwarded to the Honorable Secretary of the Interior of the United States, at Washington, D. C., and that he be requested to issue a patent for said tract of land to the St. Paul, Minneapolis and Manitoba Railway Company.

In witness whereof we have hereto set our hands and the official seal of said town of Williston this 17th day of November, A. D., 1894.

JNO. BRUEGGER, *President*. [SEAL.]

Attest:

W. J. PHILBROOK, *Clerk*.

By letter of January 5, 1895, the attorney for the company filed an affidavit by John Bruegger, president of the board of townsite trustees of the town of Williston, in which he swears

that prior to the passage of said resolution, to wit, on the 16th day of November 1894, a mass meeting of the residents of said town was called and held; that at said meeting the resolutions subsequently adopted by the said board of trustees on the 17th day of November 1894, were submitted and discussed, and said resolutions were adopted by a majority of the people present at said meeting.

Before any action was taken upon this showing submitted by the company, to wit, on March 21, 1895, the local officers forwarded an application by John C. Field, one of the residents of said town, to enter, under the homestead law, the SW. $\frac{1}{4}$ of said Sec. 24, and in an affidavit accompanying said application he alleged invalidity in the company's selection on account of the adverse occupancy of the town, and therefore petitioned the cancellation of the company's selection and that he be allowed to enter as applied for.

This application, it appears, was rejected by your office letter of April 3, 1895; from which action no appeal was taken; but on May 28, 1895, Field filed a new homestead application, covering the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said Sec. 24, the tract covered by the company's selection, and accompanied the same by an affidavit of contest against the company's selection, in which he alleged that he had resided upon the land involved for three years last past; that he had erected three buildings thereon; that he and a large number of persons, residents of said town, had no notice of the mass meeting of citizens, notice having appeared in a weekly paper but a few hours before the time fixed for the meeting; that he believes a clear majority of the citizens are utterly opposed to transferring their rights to the company; that his settlement was made with a view to entering under the homestead law; that there has been no attempt to form a townsite, nor declare one; and that fully three-fourths of the land covered by his application is vacant and uncultivated.

Upon said contest hearing was ordered for August 3, 1895, and on the 5th of that month the local officers dismissed the contest for want of service upon the company. Thereupon Field's attorney asked to be allowed to re-file the affidavit of contest and that new notice be issued; which request was granted; and on August 9, 1895, new notice was issued citing the parties to a hearing on September 28, 1895; upon which date the hearing was held.

The contestant Field, after he had submitted his own testimony, filed an affidavit for a continuance, alleging that his witnesses, some five in number, were absent, and if present would, with one exception, testify that there was no adequate call for the mass meeting, and that it did not express the feelings or desires of the community. The company admitted that the witnesses named in the application of continuance would, if present, testify to the statements set out in said application, and thereupon introduced testimony in its own behalf tending to show

that full publicity was given to the meeting held on November 16, 1894; and that the attendance at that meeting was larger than any public meeting ever held in the town.

Of the five persons named in the application for a continuance, three were shown to have been present at the mass meeting referred to.

The local officers submitted the entire record as made, without recommendation, and upon consideration of the matter, in your office decision of February 8, 1897, the application by Field to make homestead entry of the land was denied, because it was shown that at the time of his settlement the tract was used for the purposes of business and trade. From this action Field failed to appeal; so that the sole question presented by the record now before me is as to the company's right under its selection of the tract made as before stated.

With the papers forwarded is a petition, dated August 16, 1895, and signed by some sixteen persons, in which they state that they earnestly desire that the townsite shall become a government townsite, and protest against the action taken at the mass meeting called in November, 1894.

It is a fact worthy of notice that this petition was signed after the new notice had issued upon Field's contest, under which hearing was set for September 28, 1895, and that the ground of Field's contest was practically the allegation made in the petition, namely, that the action of the town board was had without due notice having been given to the occupants. It will be further recalled that at the hearing held more than a month after this petition was signed, Field was unable to secure the attendance of a single witness, the case being submitted upon his own testimony. There is little assurance, therefore, that if further opportunity were given for a hearing, better results would be now obtained.

Although no appearance has been entered on behalf of the town, nor action taken looking to the entry of the tract under the townsite laws, your office decision holds, upon the entire record as made, that— it is clearly shown that at the time of the company's selection, adverse rights existed in the occupants of the town, and the land was not subject to selection.

Several petitions have been filed recently, requesting that the status of the town be early determined, as the present unsettled condition of the question is working a hardship, improvements both public and private being retarded and prevented.

On account of the public interests involved, and at the request of all parties, the matter has been advanced for consideration.

In lieu of the relinquishment of certain lands described in the preamble of the act of August 5, 1892, *supra*, the Manitoba railway company was authorized to select non-mineral lands—

not reserved, and to which no adverse right or claim shall have attached or have been initiated at the time of making such selection.

Prior to the company's selection of this tract in December, 1892, to wit, in the month of June, 1887, one H. A. Bruns located the land now in controversy with Valentine scrip; said land being then unsurveyed. Bruns thereupon platted a portion of the tract covered by his location, as the town of Williston, and disposed of a large number of the lots within the subdivision platted by him.

In the construction of the Manitoba road it crossed a portion of the land covered by Bruns's location, and upon this land the railway company established a division terminus, placing thereon its necessary round house, coal bunkers, water tanks, station house, and other necessary buildings at such terminus.

While the record does not disclose it, in the attorney's brief it is stated that the company purchased the land necessary for the placing of these buildings from Bruns. It is alleged by the company that Bruns became financially embarrassed, and that the scrip and townsite passed into the hands of other persons. Be this as it may, it is shown that upon some agreement entered into between the successors to the rights under the scrip and the company, the scrip was withdrawn, the withdrawal being filed with the company's selection of the land. The railway company states that it agreed to protect the parties who held contracts of purchase from Bruns, many of whom had made large payments upon their contracts. It would appear that this was made the moving cause for the action of the town meeting waiving any adverse right to the railway company. It would appear, therefore, that the best interests of all parties would be served by recognizing the amicable settlement entered into between the purchasers under the scrip location and the railway company.

The question arises, however: Can it be held that the land was properly subject to the company's selection at the time it was made? For, otherwise, it must be held that the selection was invalid and can not be approved.

It is first necessary to ascertain the status of the occupants of this land at the time of the company's selection in December 1892. It is true, the land was then being used for purposes of business and trade, but the occupants were not settlers with a view to entry under the townsite laws, but rather occupants and purchasers claiming under the scrip location.

In the case of *Keith v. Townsite of Grand Junction* (on review, 3 L. D., 431) this Department held that the rule by which the validity of a settlement is determined applies as well to townsite settlers as to claimants under the homestead or pre-emption law.

The restriction under the act of 1892, under which the company makes its selection applies only to lands reserved, and to those to which an adverse right or claim shall have attached or been initiated at the time of making selection. The only adverse claim that had been initiated to this land prior to the company's selection was that growing

out of the scrip location, which was withdrawn prior to the filing of the selection by the railway company, and those claiming under purchase through the scrip location have disclaimed any intention to contest the company's right under its selection.

I do not think it can be held, therefore, upon the record as made, that an adverse right or claim had attached or been initiated to this land at the time of the company's selection; and being satisfied, upon the showing presented, that the interests of those claiming through the scrip location, who were the only rightful adverse claimants at the time of the company's selection, will be best served by the approval of the company's selection, I must reverse your office decision, and direct that the company's list be submitted for approval, with a view to the issue of patent thereon.

MINING CLAIM—ADVERSE—PROTEST—PROOF OF EXPENDITURE.

DRAPER ET AL. *v.* WELLS ET AL.

The fact that the expiration of the period of publication is erroneously stated in a foot note appended to the published notice of application for a mineral patent, will not excuse an adverse claimant from filing his adverse within the period fixed by the statute.

The corroboration of a protest is not a prerequisite to its recognition as a proper basis of inquiry, where the facts charged are shown by records of which judicial notice must be taken by the officers of the Land Department.

The statutory requirement that proof of expenditure to the amount of five hundred dollars shall be filed during the period of publication is directory only, not mandatory, as to the time when such proof shall be made; and proof, therefore, filed after the expiration of said period, showing such expenditure made in due time, may be properly considered.

In the case of a placer claim upon surveyed land, conforming to legal subdivisions, the proof of the requisite expenditure may be made otherwise than by certificate of the United States surveyor-general.

The cases of Little Pet Lode, 4 L. D., 17; and Milton *et al. v.* Lamb, 22 L. D., 339, overruled.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) December 29, 1897. (W. A. E.)

April 5, 1895, Gilbert C. Wells *et al.*, filed their application for patent to the Panther and Panther No. 2 placer mining claims, embracing the S $\frac{1}{2}$ of the NE $\frac{1}{4}$, the N $\frac{1}{2}$ of the SE $\frac{1}{4}$, the SE $\frac{1}{4}$ of the NW $\frac{1}{4}$ and the E $\frac{1}{2}$ of the SW $\frac{1}{4}$ of Sec. 32, T. 22 S., R. 68 W., Pueblo, Colorado, land district.

No protests or adverse claims were filed during the sixty days of required publication, but June 29, 1895, several days after that time, George S. Draper *et al.* offered for filing a paper purporting to be an adverse claim, but it was not signed or sworn to. This was rejected by the local officers July 1, 1895.

July 5, 1895, there was filed a certificate that suit had been instituted in the State court June 29th to sustain the adverse claim. This suit

seems to have been abandoned since the rejection of the adverse claim, and is not even referred to by the protestants in their later papers.

July 18, 1895, Wells *et al.* filed their application to purchase, together with affidavits showing five hundred dollars worth of labor and improvements on the claim.

July 23, 1895, Draper applied for leave to sign and swear to his adverse, *nunc pro tunc*. This being denied, he filed, on behalf of himself and his associates, a protest against the issuance of patent to Wells *et al.* It is alleged in this protest that the notice of application for patent was not published in a paper of general circulation nearest the land; that five hundred dollars worth of labor and improvements had not been put on the claim; that no proper proof of the amount and character of the labor and improvements was filed during the period of publication or at all. It is further alleged that protestant and his associates had located this land prior to the location of the applicants, and that the former had expended about three hundred dollars in the development and improvement of said property, and intended to procure title to the same. This protest was corroborated by S. H. Manning, but on the following day, July 24th, Manning filed a second affidavit, withdrawing his corroboration, repudiating most of the statements therein attributed to him and alleging that the corroborative affidavit was obtained from him by deceit.

July 27, 1895, Draper *et al.* appealed from the decision of the local officers, rendered July 1st, rejecting their adverse claim.

August 15, 1895, the local officers considered and dismissed the protest filed July 23, and on the same day the mineral applicants were allowed to make entry. The following day, August 16th, the entire record was transmitted to your office.

September 13, 1895, Draper *et al.* appealed from the decision of the local officers of August 15th, rejecting their protest. This appeal, however, was not forwarded to your office until October 7, 1895.

September 21, 1895, your office considered the case on the first appeal filed by Draper *et al.* (the second appeal not having reached your office) and affirmed the action of the register and receiver in dismissing the adverse on the ground that it was not signed or verified. It was stated in said decision that there was no appeal from the action of the local officers of August 15, 1895, rejecting the protest filed July 23, 1895, but the same had been considered, and that "the protest as made and corroborated lays proper grounds for a hearing, if nothing had been filed in said matter subsequently." Manning's second affidavit was then quoted, and it was held that "this affidavit so modifies the statement of said corroborating witness as to leave the protest under consideration uncorroborated, and for this reason you should have declined to order a hearing." The action of the local officers was affirmed, "not because the allegations in said protest are insufficient, but because said protest is uncorroborated." It was also said that the

action of the local officers in allowing entry while appeal was pending was irregular, but that the same should remain intact since upon the appeal the protest had proven unavailing.

October 26, 1895, Draper *et al.* filed another protest in exactly the same language as that of July 23rd. This protest (forwarded to your office without action by the register and receiver) was corroborated by Charles W. Sellers and John G. McKee. December 3, 1895, Sellers and McKee filed their joint affidavit, in which they so modify their corroboration as to practically leave the protest uncorroborated.

In a letter of February 17, 1896, denying a motion for review of your office decision of September 21, 1895, the protest filed October 26, 1895, was considered and dismissed.

March 28, 1896, Draper *et al.* appealed to the Department.

The local officers were right in rejecting the adverse filed June 29th, for the reason that it was not filed within the "sixty days of publication." It is true that a foot note to the published notice, probably placed there by the publisher for his own convenience, shows the last publication to have been July 4, 1895, but it also shows the first to have been April 11, 1895. There would be much more than sixty days of publication between April 11th and July 4th, so that the error was apparent from the foot note and could not have been misleading. This is not a case where the published notice erroneously stated the time for appearance or action by adverse parties and therefore misled them. Notices of mineral applications contain in themselves no words of citation and do not purport by their own terms to fix the time for adverse action. Following the language of the statute such a publication is simply "a notice that such application has been made," and the statute constitutes the citation and fixes the time for adverse action. The fact that the notice was published for more than the required period did not change the time fixed by law for filing an adverse. In the case of *Bonesell et al. v. McNider*, (13 L. D., 286) a similar error in a foot note to the published notice was held not to excuse the adverse claimant from filing his adverse within the period fixed by section 2325, which reads:

If no adverse claim shall have been filed . . . at the expiration of the sixty days of publication, it shall be assumed the applicant is entitled to a patent . . . and that no adverse claim exists.

The protest charges that in answer to an inquiry by Draper, the chief clerk in charge of the local land office stated "that the last publication would be on July 4, 1895, and that protestant had until the evening of July 1, 1895, in which to file his adverse." It appears from the affidavit of this clerk that Draper's inquiry was made on June 28, 1895, and as this was after the expiration of the sixty days of publication, it is immaterial what the chief clerk may have said at that time.

The protest filed July 23, 1895, was dismissed by your office September 21, 1895, and that filed October 26, 1895, was dismissed February

17, 1896,—both for the reason that the protest was uncorroborated, the corroborating witnesses having withdrawn their statements.

In your office decision of February 17, 1896, it was said:

Under the United States mineral land laws, the filing of a protest against an application for patent or an entry is allowable, and when a protest has been filed against a mineral entry, it rests in the sound discretion of the Commissioner of this office to allow a hearing thereon, or to dismiss it. It is true that the Commissioner might in the exercise of his discretion order a hearing in an exceptional case upon a protest, although it was uncorroborated. But the general and almost universal practice for many years has been to require such protests to be duly corroborated before making an order allowing a hearing.

As a general proposition it is a correct practice to decline to consider an uncorroborated protest where the facts alleged and upon which a hearing is asked are not matters of record, but it is held (*Pierce v. Bond*, 22 L. D., 345) that the corroboration of a protest is not a prerequisite to its recognition as a proper basis for inquiry where the facts charged are shown by records of which judicial notice must be taken by the officers of the Land Department.

The protestants allege, *inter alia*, that—

no proper proof of the amount and character of the improvements on said claim by the duly constituted officer, as by statute and rules and regulations of the Land Department required, was filed during the period of publication or at all.

This statement was either proven or disproved by the record in this case, of which notice should have been taken, and if proven by the record it was a proper subject of inquiry without other corroboration. Was this allegation proven?

Section 2329 of the Revised Statutes provides that:

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Section 2325, having reference to proceedings to obtain patent to vein or lode claims, provides, *inter alia*, that:

The claimant at the time of filing this application or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars worth of labor has been expended or improvements made upon the claim by himself or grantors.

With the record in the present case are affidavits showing the expenditure of five hundred dollars in labor and improvements on the claim before the expiration of the period of publication, but these affidavits were filed several days after that period.

The first question presented in regard to these affidavits is whether they were filed in time to authorize their consideration; in other words, is the provision of the statute as to the time when proof of expenditure in labor and improvements shall be filed mandatory or only directory.

The thing to be accomplished, the essence of the statutory requirement, is the development and improvement of the claim by the expenditure thereon of a stated amount in labor or improvements by the applicant or his grantors as a condition to patenting the claim. The proof thereof is required for the information and guidance of the government and not for the information or guidance of adverse parties. Differing from the annual expenditure of one hundred dollars required by law, this five hundred dollar expenditure is not a condition to the maintenance of a mineral location. It is only a prerequisite to a patent, the obtaining of which is not necessary to the continued occupation and enjoyment of a mineral claim. The failure to make this five hundred dollar expenditure does not subject the claim to the acquisition of rights by others and much less would a failure to furnish proof of such expenditure do so. The time of filing such proof does not affect the rights of others prejudicially or at all.

Judge Cooley, in his *Constitutional Limitations*, (4th Ed., 93) says:

Those directions which are not of the essence of the thing to be done, but which are given with a view merely to the proper, orderly, and prompt conduct of the business, and by a failure to obey which the rights of those interested will not be prejudiced, are not commonly to be regarded as mandatory; and if the act is performed, but not in the time or in the precise mode indicated, it may still be sufficient, if that which is done accomplishes the substantial purpose of the statute. But this rule presupposes that no negative words are employed in the statute which expressly or by necessary implication forbid the doing of the act at any other time or in any other manner than as directed.

In *Sutherland on Statutory Construction* it is said (section 447):

Where a statute is affirmative it does not necessarily imply that the mode or time mentioned in it are exclusive, and that the act provided for, if done at a different time or in a different manner, will not have effect. Such is the literal implication, it is true; but since the letter may be modified to give effect to the intention, that implication is often prevented by another implication, namely, that the legislature intends what is reasonable, and especially that the act shall have effect; that its purpose shall not be thwarted by any trivial omission, or a departure from it in some formal, incidental and comparatively unimportant particular.

Applying this rule of construction to the provision fixing the time of filing proof of this expenditure, it seems to clearly result that it is directory and not mandatory.

This is apparently in conflict with what was said in the cases of *Little Pet Lode*, 4 L. D., 17, and *Milton et al. v. Lamb*, 22 L. D., 339, but in those cases it was not shown, as it is here, that the expenditure had been made before the expiration of the period of publication.

In *Little Pet Lode*, the certificate of the surveyor-general showing the required expenditure was made and filed over a year after the period of publication. It was not shown when the improvements had actually been made, but the report of the United States deputy mineral surveyor showed that at the time of survey there had not been five hundred dollars expended.

In *Milton et al. v. Lamb*, the deputy who made the survey certified to

only one hundred and twenty-five dollars worth of improvements. It was not claimed or shown that five hundred dollars had been expended in labor and improvements prior to the expiration of the period of publication, and the certificate of the surveyor-general showing the required expenditure in amount was not made until several months after that period.

It thus appears that the facts in those cases were different from those here, and that a part of what was then said was not necessary to a disposition of the questions actually presented. To the extent that those cases are in conflict with the ruling here announced, they will not be followed, and are overruled.

We come now to the question whether, in case of a placer claim upon surveyed lands and conforming to legal sub-divisions, the proof of the required expenditure may be made otherwise than by a certificate of the United States surveyor-general.

It appears that it has been the practice of your office for some time past to accept as proof of the required expenditure in such cases affidavits similar to those here filed. This practice is founded upon the decision in the case of Rosina T. Gerhauser, 7 L. D., 390, wherein it was held that (syllabus):

An examination of a placer claim and report thereon, by a deputy mineral surveyor, at the expense of the applicant for patent, should not be required, where the claim is upon surveyed land and in conformity with legal subdivisions.

It may be observed that the statute does not require proceedings to obtain patent to placer claims to be the *same* or *identical* with those to obtain patent to lode claims. Section 2329 of the Revised Statutes provides that:

Claims usually called "placers" . . . shall be subject to entry and patent, under *like* circumstances and conditions and upon *similar* proceedings, as are provided for vein or lode claims.

Now, the requirement that the claimant shall furnish proof of the expenditure of five hundred dollars on the claim is just as necessary, and just as applicable, in the case of a placer claim as in the case of a lode claim. Its object is to evidence the good faith of the claimant and to demonstrate the mineral character of the land; but the reason for requiring the proof of this expenditure to be by certificate of the surveyor-general in the case of a lode claim does not seem to apply to a placer claim located upon surveyed land according to legal subdivisions. Lode claims are never located according to legal subdivisions but according to the course of the vein or lode, and a special survey and plat thereof must be made. It seems to have been believed appropriate that the United States officer who has charge of this surveying and platting should furnish the certificate of expenditure for labor and improvements. With reference to placer claims, however, section 2331, R. S., provides, *inter alia*, that:

Where placer claims are upon surveyed lands and conform to legal subdivisions no further survey or plat shall be required.

This claim being located upon surveyed lands and conforming to legal subdivisions, no further survey or plat is required, and the special reason for requiring the certificate of the surveyor-general in lode claims does not exist. To require such a certificate would be to put the claimant to a considerable expense for the services of a deputy mineral surveyor, who would have no duty to perform but to examine and report on the labor and improvements. By the affidavits of credible witnesses who are personally acquainted with the claim the requisite expenditure may be conveniently and reasonably proven. The establishing of this fact in this manner would be a *similar proceeding* to that provided for vein or lode claims. If the provision for the surveyor-general's certificate in cases of vein or lode claims be mandatory, as to which no opinion is now expressed, it is not extended in its mandatory form to placer claims located upon surveyed land and conforming to legal subdivisions.

The allegation of insufficient proof of expenditure is not supported by the record and the other charges being uncorroborated, your office decision is affirmed.

The defendants have filed a motion to dismiss this appeal, urging that the appellants are protestants without interest and not entitled to appeal. The disposition of the case hereinbefore made renders it unnecessary to rule upon this motion.

HILL *v.* GIBSON.

Motion for review of departmental decision of July 27, 1897, 25 L. D., 63, denied by Acting Secretary Ryan December 29, 1897.

OKLAHOMA TOWNSITE—SECTION 22, ACT OF MAY 2, 1890.

CITY OF ENID.

The right to the purchase money paid on the commutation of a homestead entry for townsite purposes can only be recognized on behalf of an independent municipal organization.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) December 29, 1897. (P. J. C.)

With your office letter "M" of June 2, 1897, is transmitted the application of S. R. Marshall, mayor and agent of the city of Enid, Oklahoma Territory, for the payment to the said city of Enid of the sum of \$1,413.70, paid to the Secretary of the Interior by Maurice A. Wogan for the NW. $\frac{1}{4}$ of Sec. 7, T. 22 N., R. 6 W., being cash entry No. 5, Enid, Oklahoma, land district, under the provisions of section 22 of the act of May 2, 1890 (26 Stat., 81); and also a protest against the same, filed by the residents of Kenwood, and accompanying papers. This matter is submitted to the Department for instruction.

It is stated in your office letter that Wogan made entry of the described land July 20, 1894, "according to the approved plats of the townsite of Kenwood, Oklahoma Territory."

There is no question raised by the protestants in this matter as to the validity of the organization of the city of Enid, as a city of the first class, under the Oklahoma statutes. It may be said, however, that from an investigation of the record, together with the statute, it seems to be regular in all particulars.

Section 5, article 5, chapter 14, of the statutes of Oklahoma (1893), reads as follows:

The city council in their discretion may add from the territory adjacent to the city limits, as defined and existing at the date of the approval of this act, such additional territory as they may deem proper, and shall in every case have power to increase or diminish the city limits, in such manner as in their judgment and discretion may redound to the benefit of the city: *Provided*, That in no case shall any adjacent territory, except when sub-divided into tracts or parcels of less than five acres, be added to the limits of the city without the consent in writing of the owners of a majority of the whole number of acres, owned by residents of Oklahoma, of the territory to be added: *Provided*, That tracts of land in excess of five acres used for agricultural purposes shall not be subject to city taxes.

At a special meeting of the city council, the request for which was properly signed as provided by section 1, article 3, chapter 14, Statutes of Oklahoma, held on the 11th day of September, 1895, an ordinance was passed by which the land described,

known as Kenwood, being adjacent to the limits of the city of Enid and subdivided into tracts, parcels, of less than five (5) acres each, be, and the same hereby is, added to, incorporated into, and made a part and parcel of the said city of Enid.

This ordinance was published as provided by law and was to be in full force and effect from and after publication.

It appears that W. A. Lee and five others, residents of what is said to have been the "townsite of Kenwood," on September 3, 1895, filed a petition before the board of county commissioners of the county in which the land is situated, stating that the townsite was platted and recorded, that there were then residing upon said tract twenty-nine persons, and asking that the townsite of Kenwood be incorporated as the village of Kenwood under the statutes of Oklahoma.

Upon this petition the board of county commissioners, on October 8, 1895, passed a resolution by which it was ordered that a meeting of the qualified residents be held, at a place named, on the 28th day of October, 1895, to determine whether said territory and the people thereof shall be an incorporated town.

It appears that the city of Enid brought a suit against the board of county commissioners and the residents of the townsite of Kenwood, and that a temporary restraining order was issued against the defendants, by the district court, restraining them and each of them from holding any election for the purpose of voting upon the question of incorporation, or from making any order in respect thereto, or doing or

performing any act with reference to the said incorporation of the said tract of land as a village.

At the time the present application for this fund was presented to your office, there was nothing in the record showing what was the final disposition of this suit, but the Department is now in receipt of a certified copy of the proceedings had in this connection in the district court, by which it appears that on March 10, 1896,

upon defendant's motion to quash the writ herein, . . . the court sustains defendant's motion and dismisses this cause at plaintiff's cost.

It is not shown by anything in the record whether there has been any further action taken by the residents of Kenwood to perfect the incorporation of the same as a village, and as the record stands before the Department to-day, it seems that Kenwood is now a part of the city of Enid, having been attached thereto by such proceedings as are provided for by statute. The record showing nothing to the contrary, it must therefore be held that this tract of land, which was entered under section 22 of the act of May 2, 1890, is now a part and parcel of the municipality of the city of Enid.

This section of the statute, so far as relates to the subject under consideration, reads as follows:

Provided, further, That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for townsite purposes. He shall file with the application a plat of such proposed townsite, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said townsite, upon the payment of the sum of ten dollars per acre for all the lands embraced in such townsite, except the lands to be donated and maintained for public purposes as provided in this section. And the sum so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

It is under the provisions of this statute that the city of Enid now makes demand for the payment of the purchase money of this tract of land, and upon the record as presented it seems to me that the payment should be made.

It is directed by the last paragraph of the statute quoted, that the money "shall be paid over to the proper authorities of the municipalities *when organized*." That which precedes does not necessarily mean that land to be so purchased must at the time be within an organized or incorporated town. It is necessary that it be required for townsite purposes and be platted as a townsite, but a townsite and an organized town are however not synonymous. Organization or incorporation, while not necessary to a purchase or entry under the act, is a prerequisite to payment by the Secretary of the Interior, for it is to the municipality ("when organized") embracing such land that payment is to be so made.

In the absence of any independent municipal organization of Kenwood, and in view of the inclusion of this tract within the city of Enid, the purchase money should be paid over to the proper authorities of the latter town.

Reference is also made in your letter to the entry made by Luther M. McGuire of 29.99 acres, being entry No. 66, for the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 8, said township and range, under the same statute.

This tract, it also appears by the record before me, has been by legal action by the council included within the corporate limits of the city of Enid. It is stated by your said office letter that there is the sum of \$299.93 due the authorities of the city of Enid by reason of this transaction. There being no objection offered by any one in this behalf, the recommendation of your office is approved.

Certificates will therefore be duly issued, addressed to the Honorable Secretary of the Treasury, stating that the city of Enid is entitled to the money applied for by reason of cash purchases No. 5 and No. 66 as aforesaid; and you are hereby directed to state an account in favor of the city of Enid, Oklahoma Territory, for the use and benefit of the public schools of said city.

DESMOND *v.* JUDD ET AL.

Motion for review of departmental decision of May 29, 1896, 22 L. D., 619, denied by Secretary Bliss, December 31, 1897.

GENERAL LAND OFFICE.

UNITED STATES MINING LAWS,
AND
REGULATIONS THEREUNDER.

APPROVED DECEMBER 15, 1897.

UNITED STATES MINING LAWS, AND REGULATIONS THERE- UNDER, RELATIVE TO THE RESERVATION, EXPLORATION, LOCATION, POSSESSION, PURCHASE, AND PATENTING OF THE MINERAL LANDS IN THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE.

MINERAL LANDS OPEN TO EXPLORATION, OCCUPATION, AND PURCHASE.

SEC. 2318, R. S. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. Mineral lands reserved.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. 4 July, 1866, c. 166, s. 5, v. 14, p. 86.
Mineral lands open to purchase by citizens.
10 May, 1872, c. 152, s. 1, v. 17, p. 91.

NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

LODE CLAIMS.

SEC. 2320, R. S. Mining claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. Length of mining claims upon veins or lodes.
10 May, 1872, c. 152, s. 2, v. 17, p. 91.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the Locators' rights of possession and enjoyment.
10 May, 1872, c. 152, s. 3, v. 17, p. 91.

laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Where veins intersect, etc.

10 May, 1872, c. 152, s. 14, v. 17, p. 96.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

CLAIMS LOCATED OR PATENTED PRIOR TO MAY 10, 1872.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

CLAIMS LOCATED SUBSEQUENTLY TO MAY 10, 1872.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made subsequent to May 10, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall

in no case exceed three hundred feet on each side of the middle of the vein at the surface, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on either side of the middle of the vein at the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration where the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

7. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the *public domain*." In applications for lode claims where the survey conflicts with the survey or location lines of a prior valid lode claim and the ground within the conflicting surveys is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it. The end line of his survey should not, therefore, be established beyond such intersection.

8. Where, however, the lode claim for which survey is being made was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be so run as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending both the side lines of a survey into the

conflicting claim, and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

DESCRIPTION OF CLAIM AND ACTS NECESSARY IN ORDER TO HOLD THE SAME—LOCAL RULES AND REGULATIONS.

Regulations made by miners,

10 May, 1872, c. 152, s. 5, v. 17, p. 92.

SEC. 2324, R. S. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

Claim located prior to May 10, 1872, first annual expenditure extended to Jan. 1, 1875.

Act of Congress appd. June 6, 1874 (18 Stat. L., 61).

On unpatented claims period commences on Jan. 1 succeeding date of location.

Act of Congress appd. Jan. 22, 1880 (21 Stat. L., 61).

Description of vein claims on surveyed and unsurveyed lands.

10 May, 1872, c. 152, s. 8, v. 17, p. 94.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

SEC. 2327, R. S. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

9. Locators can not exercise too much care in defining

their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

10. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

11. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft, or run a tunnel or drift, to a sufficient depth therein to discover and develop a mineral-bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

12. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

13. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

14. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode

until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues.

15. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of or applied upon the first annual expenditure required by law.

16. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

17. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Act of Congress approved July 18, 1894 (28 Stat. L., 114).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

SEC. 2. That this act shall take effect from and after its passage.

Money expended in a tunnel considered as expended on the lode.

Act of Congress approved February 11, 1875 (18 Stat. L., 315).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

18. Upon the failure of any one of several co-owners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the co-owners, who have performed the labor or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent co-owner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent co-owner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his co-owners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent co-owner failed to contribute his proper proportion within the period fixed by the statute.

TUNNELS.

SEC. 2323, R. S. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Owners of tunnels, rights of.

10 May, 1872, c. 152, s. 4, v. 17, p. 92.

19. The effect of this is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

20. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

21. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper

notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the *locus* in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

22. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

23. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

24. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

PLACERS.

SEC. 2329, R. S. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Conformity of placer claims to surveys, limit of.

9 July, 1870, c. 225, s. 12, v. 16, p. 317.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

Subdivisions of ten-acre tracts; maximum of placer locations.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

Conformity of placer claims to surveys; limitation of claims.

10 May, 1872, c. 152, s. 10, v. 17, p. 94.

25. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

BUILDING STONE.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

Act of Congress approved, August 4, 1892 (27 Stat. L. 348).

26. This act extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law by authorizing a placer entry of such lands. It does not operate, however, to withdraw lands chiefly valuable for building stone from entry under any existing law applicable thereto. Registers and receivers should therefore make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. It will be noted that lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

PETROLEUM AND OTHER MINERAL OILS.

Entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws.

Act of Congress approved February 11, 1897 (29 Stat. L., 526).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided,* That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

27. It is to be observed that the provisions of the mineral laws relating to placers are by said act extended so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

28. By section 2330 authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

29. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

30. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or, if parallelograms, five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented in addition to the other *data* required in the notice.

31. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$," or, if in the form of a parallelogram as aforesaid, it may be described as the "W. $\frac{1}{2}$ of the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ (or the N. $\frac{1}{2}$ of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$) of section—, township—, range—," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. The annual expenditure to the amount of \$100, required by section

2324, Revised Statutes, must be made upon placer claims as well as lode claims.

32. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases whether the lode is claimed or excluded, it must be surveyed and marked upon the plat; the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. It should be remembered that an application which omits to include an application for a known vein or lode therein, must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

33. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

34. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States systems of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

35. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

36. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that where placer claims are upon *surveyed* public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

SEC. 2325, R. S. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States Surveyor General, for the purpose of obtaining a patent for mineral lands, how obtained.

10 May, 1872, c. 152, s. 6, v. 17, p. 92.

States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Application for patent may be made by authorized agent.

Sec. 1. Act Congress approved January 22, 1880 (21 Stat. L., 61).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: And provided, That this section shall apply to all applications now pending for patents to mineral lands."

Pending applications; existing rights.

10 May, 1872, c. 152, s. 9, v. 17, p. 94.

SEC. 2328. Applications for patents for mining claims under former laws now pending may be prosecuted to a final decision in the General Land Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

37. As a condition for the making of application for patent according to section 2325, there must be a preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year; or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

38. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

LODE CLAIM.

39. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor-general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

40. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the mine; and when the original location is made by survey of a United States deputy surveyor such location survey can not be substituted for that required by the statute, as above indicated.

DIRECTIONS FOR PREPARING PLAT.

41. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim, with reference to the lines of public surveys, by a line connecting a corner of the claim with the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands the connection should be made with such corner in preference to a connection with a United States

mineral monument. The connecting line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey and be made a part thereof.

42. Upon the approval of the survey of a mining claim made upon surveyed lands the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section, and giving the area of each lot.

43. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim.....	10.50
Area in conflict with survey No. 302.....	1.56
Area in conflict with survey No. 948.....	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed.....	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms.

44. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim; the mining district and county; whether or not the location is of record, and, if so, where the record may be found, giving the book and page thereof; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed on the lode in each direction from the point of discovery or other well-defined place on the claim; the names of all adjoining and conflicting claims, or, if none exist, the notice should so state.

45. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of

the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit. The plat forwarded as part of the proof should not be *folded*, but *rolled*, so as to prevent creasing, and either transmitted in a separate package or so enclosed with the other papers that it may pass through the mails without creasing or mutilation. If forwarded separately, the letter transmitting the papers should state the fact.

46. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

47. This sworn statement must be supported by a copy of the location notice, certified by the officer in charge of the records where the same is recorded, and where the applicant for patent claims the interests of others associated with him in making the location, or only as purchaser, in addition to the copy of the location notice, must be furnished a complete abstract of title as shown by the record in the office where the transfers are by law required to be recorded, certified to by the officer in charge of the record, under his official seal. The officer should also certify that no conveyances affecting the title to the claim in question appear of record other than those set forth in the abstract, which abstract shall be brought down to the date of the application for patent. Where the applicant claims as sole locator, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.

48. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

49. Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same,

giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

50. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, ten consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues, the first day of issue being excluded in estimating the period of sixty days.

51. The notices so published and posted must be as full and complete as possible, and embrace all the *data* given in the notice posted upon the claim. Too much care can not be exercised in the preparation of these notices, inasmuch as upon their accuracy and completeness will depend, in a great measure, the regularity and validity of the whole proceeding.

52. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

53. The claimant, either at the time of filing these papers with the register or at any time during the sixty days' publication, is required to file a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made upon the claim, and if more than one claim is included in the application, that an amount equal to five hundred dollars for each claim has been expended by the applicant or his grantors; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will, if incorporated into a patent, serve to fully identify the premises, and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the *locus* thereof.

54. The surveyor-general should derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

55. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

56. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the

plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

57. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as otherwise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

PROTEST.

58. At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in a matter which would avoid the claim. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a coowner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. See *Turner v. Sawyer*, 150 U. S., 578-586.

59. Any party applying to make entry as *trustee* must disclose fully the nature of the trust and the name of the *cestui que trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

PLACERS.

60. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required; and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys

and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

61. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

Proceedings for patent for placer claim, etc.

10 May, 1872, c. 152, s. 11, v. 17, p. 94.

SEC. 2333, R. S. Where the same person, association, or corporation is in possession of a placer claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer claim not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral and other deposits within the boundaries thereof.

62. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon

the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(3) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(4) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(5) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

MILL SITES.

63. Mill sites are not mineral entries. On the contrary, the land entered must be shown to be nonmineral. They are simply auxiliary to the working of mineral claims, but as the section granting the right of entry is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

SEC. 2337, R. S. Where nonmineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such nonadjacent surface ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such nonadjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz mill or reduction works, not owning a mine in connection therewith, may also receive a patent for his mill site, as provided in this section.

Patents for nonmineral lands, etc.

10 May, 1872, c. 152, s. 15, v. 17, p. 96.

64. To avail themselves of this provision of law parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto, for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, United States Revised Statutes, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode, such noncontiguous mill site, and after due proceedings as to notice,

etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

65. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever may be its appropriate numerical designation; the course and distance from a corner of the mill site to a corner of the lode claim to be invariably given in such plat and field notes, and a copy of the plat and notice of application for patent must be conspicuously posted upon the mill site as well as upon the vein or lode for the statutory period of sixty days. In making the entry no separate receipt or certificate need be issued for the mill site, but the whole area of both lode and mill site will be embraced in one entry, the price being five dollars for each acre and fractional part of an acre embraced by such lode and mill-site claim.

66. In case the owner of a quartz mill or reduction works is not the owner or claimant of a vein or lode the law permits him to make application therefor in the same manner prescribed herein for mining claims, and after due notice and proceedings, in the absence of a valid adverse filing, to enter and receive a patent for his mill site at said price per acre.

67. In every case there must be satisfactory proof that the land claimed as a mill site is not mineral in character, which proof may, where the matter is unquestioned, consist of the sworn statement of two or more persons capable, from acquaintance with the land, to testify understandingly.

PROOF OF CITIZENSHIP.

Proof of citizenship.

SEC. 2321, R. S. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

10 May, 1872, c. 152, s. 7, v. 17, p. 94.

68. The proof necessary to establish the citizenship of applicants for mining patents must be made in the following manner: In case of an incorporated company, a certified copy of their charter or certificate of incorporation must be filed. In case of an association of persons unincorporated, the affidavit of their duly authorized agent, made upon his own knowledge or upon information and belief, setting forth the residence of each person forming such association, must be submitted. This affidavit must be accompanied by a power of attorney from the parties forming such association, authorizing the person who makes the affidavit of citizenship to act for them in the matter of their application for patent.

69. In case of an individual or an association of individuals who do not appear by their duly authorized agent,

you will require the affidavit of each applicant, showing whether he is a native or naturalized citizen, when and where born, and his residence.

70. In case an applicant has declared his intention to become a citizen or has been naturalized, his affidavit must show the date, place, and the court before which he declared his intention, or from which his certificate of citizenship issued, and present residence.

71. The affidavit of the claimant as to his citizenship may be taken before the register or receiver, or any other officer authorized to administer oaths within the land district; or, if the claimant is residing beyond the limits of the district, the affidavit may be taken before the clerk of any court of record or before any notary public of any State or Territory.

72. If citizenship is established by the testimony of disinterested persons, such testimony may be taken at any place before any person authorized to administer oaths, and whose official character is duly verified.

73. In sending up the papers in the case the register must not omit certifying to the fact that the notice was posted in his office for the full period of sixty days, such certificate to state distinctly when such posting was done and how long continued.

74. No entry will be allowed until the register has satisfied himself, by a careful examination, that proper proofs have been filed upon all the points indicated in official regulations in force, and that they show a sufficient *bona fide* compliance with the laws and such regulations.

75. The consecutive series of numbers of mineral entries must be continued, whether the same are of lode or placer claims or mill sites.

POSSESSORY RIGHT.

SEC. 2332, R. S. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

What evidence of possession, etc., to establish a right to a patent.

9 July, 1870, c. 235, s. 13, v. 16, p. 217.

76. This provision of law will greatly lessen the burden of proof, more especially in the case of old claims located many years since; the records of which, in many cases, have been destroyed by fire, or lost in other ways during the lapse of time, but concerning the possessory right to which all controversy or litigation has long been settled.

77. When an applicant desires to make his proof of possessory right in accordance with this provision of law, he will not be required to produce evidence of location, copies of conveyances, or abstracts of title, as in other cases, but will be required to furnish a duly certified copy of the statute of limitation of mining claims for the State or Territory, together with his sworn statement giving a clear

and succinct narration of the facts as to the origin of his title, and likewise as to the continuation of his possession of the mining ground covered by his application; the area thereof; the nature and extent of the mining that has been done thereon; whether there has been any opposition to his possession, or litigation with regard to his claim and, if so, when the same ceased; whether such cessation was caused by compromise or by judicial decree, and any additional facts within the claimant's knowledge having a direct bearing upon his possession and bona fides which he may desire to submit in support of his claim.

78. There should likewise be filed a certificate, under seal of the court having jurisdiction of mining cases within the judicial district embracing the claim, that no suit or action of any character whatever involving the right of possession to any portion of the claim applied for is pending, and that there has been no litigation before said court affecting the title to said claim or any part thereof for a period equal to the time fixed by the statute of limitations for mining claims in the State or Territory as aforesaid, other than that which has been finally decided in favor of the claimant.

79. The claimant should support his narrative of facts relative to his possession, occupancy, and improvements by corroborative testimony of any disinterested person or persons of credibility who may be cognizant of the facts in the case and are capable of testifying understandingly in the premises.

ADVERSE CLAIMS.

Adverse claim,
proceedings on.

10 May, 1872, c.
152, s. 7, v. 17, p.
93.

SEC. 2326, R. S. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment roll to the Commissioner of the General Land Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein con-

tained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

In action brought title not established in either party.

Act of Congress approved March 3, 1881 (21 Stat. L., 505).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Adverse claim may be verified by agent.

Sec. 1. act of Congress approved April 26, 1882 (22 Stat. L., 49).

80. An adverse mining claim must be filed with the register and receiver of the land office where the application for patent was filed, or with the register and receiver of the district in which the land is situated at the time of filing the adverse claim. It must be on the oath of the adverse claimant, or it may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated.

81. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

82. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

83. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

84. In order that the "boundaries" and "extent" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict. This plat must be made from an actual survey by a United States deputy surveyor, who will officially certify thereon to its correctness; and in addition there must be attached to such plat of survey a certificate or sworn statement by the surveyor as to the

approximate value of the labor performed or improvements made upon the claim by the adverse party or his predecessors in interest, and the plat must indicate the position of any shafts, tunnels, or other improvements, if any such exist, upon the claim of the party opposing the application, and by which party said improvements were made: *Provided, however*, That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat.

85. Upon the foregoing being filed within the sixty days' publication, the register, or in his absence the receiver, will give notice in writing to *both parties* to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

86. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

87. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

88. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

89. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

90. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

VERIFICATION OF AFFIDAVITS IN RELATION TO MINERAL ENTRIES.

Sec. 2335, R. S. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Verification of affidavits, &c.

10 May, 1872, c. 152, s. 13, v. 17, p. 95.

Sec. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

Sec. 2, act of Congress approved April 26, 1862 (22 Stat. L., 49).

(See Adverse claims.)

GENERAL LEGISLATION.

Sec. 2338, R. S. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

What conditions of sale may be made by local legislature.

26 July, 1866, c. 262, s. 5, v. 14, p. 252.

Sec. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Vested rights to use of water for mining, etc.; right of way for canals.

26 July, 1866, c. 262, s. 9, v. 14, p. 253.

Sec. 2340. All patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under or recognized by the preceding section.

Patents, preemptions, and homesteads subject to vested and accrued water rights.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Sec. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this title, relating to "Homesteads."

Mineral lands in which no valuable mines are discovered open to homesteads.

26 July, 1866, c. 262, s. 10, v. 14, p. 253.

Sec. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to preemption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

Mineral lands, how set apart as agricultural lands.

26 July, 1866, c. 262, s. 11, v. 14, p. 253.

Additional land districts and officers, power of the President to provide.

26 July, 1866, c. 262, s. 1, v. 14, p. 252.

Provisions of this chapter not to affect certain rights.

10 May 1872, c. 152, s. 16, v. 17, p. 96.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Mineral lands in certain States excepted.

18 Feb., 1873, c. 159, v. 17, p. 465.

Grant of lands to States or corporations not to include mineral lands.

30 Jan., 1865, Res. No. 10, v. 13, p. 567.

Missouri and Kansas excluded from the operation of the mineral laws.

Act of Congress approved May 5, 1876, (19 Stat. L., 52).

Citizens of Colorado, Nevada, and the Territories authorized to fell or remove timber on the public domain for mining and domestic purposes.

Act of Congress approved June 3, 1878 (20 Stat. L., 88).

SEC. 2343. The President is authorized to establish additional land districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

SEC. 2344. Nothing contained in this chapter shall be construed to impair in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona fide entries of such lands within the States named since the tenth of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two and all lands in said States shall be subject to disposal as agricultural lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all citizens of the United States and other persons, bona fide residents of the State of Colorado, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact: and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five

hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

Alabama excepted from the operation of the mineral laws.

Act of Congress approved March 3, 1883 (22 Stat. L., 487).

AN ACT providing a civil government for Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further,* That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by payment as aforesaid: *And provided also,* That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

Mining laws extended to the District of Alaska.

Act of Congress approved May 17, 1884 (23 Stat. L., 24).

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided,* That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. * * *

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act Mar. 3, 1891, sec. 17.)

Reservation in patents for right of way for ditches and canals constructed.

Act of Congress approved August 30, 1890. (26 Stat. L., 371.)

AN ACT To repeal timber-culture laws, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, * * *

Town sites on mineral lands authorized.

Lands entered under the mineral laws not included in restriction to 320 acres.

Act of Congress approved March 3, 1891 (26 Stat. L., 1095).

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

SEC. 17. That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "no person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws.

APPOINTMENT OF DEPUTIES FOR SURVEY OF MINING CLAIMS—CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS AND RECEIVERS, ETC.

Surveyor-general to appoint surveyors of mining claims, etc.

10 May, 1872, c. 152, s. 12, v. 17, p. 95.

SEC. 2334, R. S. The surveyor-general of the United States may appoint in each land district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land district where mines are situated for the publication of mining notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land Office.

91. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

92. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* deputies for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The claimant may employ *any* deputy surveyor within such district to do his work in the field. Each deputy mineral surveyor before entering upon the duties of his office or appointment shall be required to enter into such bond for the faithful performance of his duties as may be prescribed by the regulations of the Land Department in force at that time.

93. With regard to the *platting* of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

94. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining district for the greater convenience of miners.

95. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors-general and local land officers are expected to report any infringement of this regulation to this office.

96. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

97. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

98. At the time of payment of fee for mining application or adverse claim the receiver will issue his receipt therefor in duplicate, one to be given the applicant or adverse claimant, as the case may be, and one to be forwarded to the Commissioner of the General Land Office *on the day of issue*. The receipt for mining application should have attached the certificate of the register that the lands included in the application are vacant lands subject to such appropriation.

99. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

100. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

HEARINGS TO DETERMINE CHARACTER OF LANDS.

101. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the mineral character of lands.

102. No public land shall be withheld from entry as agricultural land on account of its mineral character except such as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

103. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor-general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

RAILROAD AND STATE SELECTIONS.

104. Where a railroad company seeks to select lands not returned as mineral, but within six miles of any mining location, claim, or entry, or where in the case of a selection by a State, the lands sought to be selected are within a township in which there is a mining location, claim, or entry, publication must be made of the lands selected at the expense of the railroad company or State for a period of sixty days, with posting for the same period in the land office for the district in which the lands are situated, during which period of publication the local land officers will receive protests or contests for any of said tracts or subdivisions of lands claimed to be more valuable for mining than for agricultural purposes.

105. At the expiration of the period of publication the register and receiver will forward to the Commissioner of the General Land Office the published list, noting thereon any protests, or contests, or suggestions as to the mineral character of any such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list, when a hearing may be ordered.

106. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or

gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

107. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

108. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

109. When the case comes before this office such decision will be made as the law and the facts may justify; in cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party *at his own expense* will be required to have the work done, at his option, either by United States deputy, county, or other local surveyor; application therefor must be made to the register and receiver, accompanied by a description of the land to be segregated, and the evidence of service upon the opposite party of notice of his intention to have such segregation made; the register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, United States Revised Statutes, as to length and width and parallel end lines.

110. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

111. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

112. With the copy of plat and description furnished the local office and this office, must be a diagram tracing, verified by the surveyor-general, showing the claim or

claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 45, in the survey of mining claims on surveyed lands.

113. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

MINERAL ENTRIES WITHIN FOREST RESERVES.

The following is an extract from circular entitled Rules and Regulations governing Forest Reservations, established under section 24 of the act of March 3, 1891 (26 Stat. L., 1095). Approved June 30, 1897. (24 L. D., 589-593-594.)

LOCATION AND ENTRY OF MINERAL LANDS.

19. The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

20. Owners of valid mining locations made and held in good faith under the mining laws of the United States and the regulations thereunder are authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim from which the timber is felled or removed. (For further use of timber by miners see below, under heading "Free use of timber and stone.")

FREE USE OF TIMBER AND STONE.

21. The law provides that "The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located."

This provision is limited to persons resident in forest reservations who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other

natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them, but not for sale or disposal, or use on other lands, or by other persons: *Provided*, That where the stumpage value exceeds one hundred dollars, application must be made to and permission given by the Department.

BINGER HERMANN,
Commissioner.

Approved December 15, 1897.

C. N. BLISS,
Secretary.

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